Supreme Court, U.S.
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In The

Supreme Court of the United States

E. RANDEL T. OSBURN; LINDA DUBOSE; BRENDA LOWE CLEMONS; DOROTHY PERRY; WENDELL MUHAMMAD,

Petitioners,

v.

STATE OF GEORGIA; CATHY COX, Secretary of State of Georgia; SONNY PURDUE, Governor of Georgia; DEKALB COUNTY BOARD OF ELECTIONS AND REGISTRATION; GWINNETT COUNTY BOARD OF ELECTIONS AND REGISTRATION; LINDA LATIMORE, DeKalb County Elections Supervisor; LYNN BEDFORD, Gwinnett County Elections Supervisor; GEORGIA DEMOCRATIC PARTY,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Did the complaint, challenging a malicious Republican crossover vote in the 2002 Georgia 4th democratic congressional primary, set out a sufficient claim under Section 2 of the Voting Rights Act, 42 U.S.C. § 1973, so as to withstand a Rule 12(b)(6) motion to dismiss?

2. Can black democratic party members assert a First Amendment right of association claim in order to protect their party primary from a malicious Republican crossover under *California Democratic Party v. Jones*, or does that right belong solely to the state political party?

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PETITION FOR A WRIT OF CERTIORARI

Petitioners pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eleventh Circuit, entered May 17, 2004. *Osburn v. Cox*, ___ F.3d ___ (No. 03-14349, 5/17/2004) (Appendix p. 1).

RULINGS BELOW

On May 17, 2004, the Eleventh Circuit Court of Appeals entered its order denying Petitioner's appeal and affirming the ruling of the district court dismissing the complaint under Rule 12(b)(6). *Osburn v. Cox*, ___ F.3d ___, No. 03-14349, 5/17/2004) (Appendix p. 1, 11).

The Eleventh Circuit held that the Plaintiffs as simply party members did not have standing to challenge the state's regulation of the primary:

Although the Supreme Court has not explicitly said that only the party proper, and not individual members of the party, may challenge a state's regulation of a political party's primary, the case law points to such a result.

(*Id.* Appendix, p. 6).

The Plaintiffs claim was that this was a "malicious" crossover. The Eleventh Circuit did not address the issue although it did acknowledge the issue:

> The gravamen of the Plaintiffs' amended complaint was that the Georgia and DeKalb County Republican party members conceived a plan to run a candidate (Majette) in the Democratic Primary, funded that candidate, and then

> encouraged the Republican voters to crossover and vote for that candidate.

(*Id.*, Appendix, p. 3).

Without addressing the effect of a malicious white Republican crossover on the black democratic majority of voters the Eleventh Circuit found no violation of the voting rights act:

> The facts alleged by the Plaintiffs, i.e., that Republican voters crossed over and voted for Majette rather than McKinney, do not demonstrate a violation of Section 2 of the Voting Rights Act. The Plaintiffs have not alleged facts to support a claim that the minority group has been excluded from meaningful access to the political process due to the interaction of racial bias in the community with the challenged voting system

(*Id.*, Appendix, p. 11).

In its August 1, 2003 order, the district court stated the Rule 12(b)(6) dismissal standards, then proceeded to assess how the claims of the amended complaint were inadequate to survive the motions to dismiss. " . . . In assessing the merits of a Rule 12(b)(6) motion, the court must assume that all the factual allegations set forth in the complaint are true." (Appendix, p. 15; R2-44-3). "Moreover, in determining whether to grant a Rule 12(b)(6) motion, the court only considers the allegations in the complaint, which it liberally construes in the light most favorable to the plaintiffs." (Appendix, p. 15; R2-44-4). "Thus, a motion to dismiss will be denied unless it appears beyond all doubt that the plaintiff can prove no set of facts in support of his claims that would entitle him to relief."

Id. "In civil rights cases, the complaint must allege the relevant facts 'with some specificity.'" *Id.*

The district court found that the Fourteenth and Fifteenth Amendment allegations made by plaintiffs "do not include any factual basis for such an assertion." (Appendix, p. 18; R2-44-7). "Put simply, none of the factual allegations in the complaint support a reasonable inference that any of the defendants took any action whatsoever on account of any persons race or color or for the purpose of discriminating against any person on the basis of their race or color." *Id.* The amended complaint at paragraphs 9-12 gives facts common to all counts. (Appendix, p. 24; R2-30). At paragraph 12 the plaintiffs state that the Georgia Republican Party and the DeKalb Republican party conceived and orchestrated a plan to run a candidate against incumbent McKinney, funded that candidate and encouraged the Republican voters in the Fourth District to vote for Denise Majette. Implicit in this statement is the use of the "open primary" system to facilitate their objectives. At paragraph 15 the plaintiffs alleged that the use of the open primary resulted in the defeat of the candidate (McKinney) "preferred by the overwhelming majority of African-American voters." (Appendix, p. 31; R2-30).

In reference to the Voting Rights Act claims, the district court also concluded that "there are no factual allegations which if proved, would establish that any of the plaintiffs had less opportunity to participate and elect the candidate of choice." (Appendix, p. 17; R2-44-8). At paragraph 30 of the amended complaint the plaintiffs stated that the use of the open primary is a voting procedure which impacts the rights of African-American Democratic voters to vote in the Democratic Party primary on account of race. (Appendix, p. 3 paragraph 30; R2-30). At paragraph 32 (Appendix, p. 32

paragraph 32) the plaintiffs indicate that the effect of the open primary system in the Fourth Congressional District is the nomination of a person as the Democratic party candidate who was not the choice of the majority of the Democratic Party voters, who are overwhelmingly African-American, who voted in the August 2002 primary. *Id.* In support of this proposition the plaintiffs submitted a detailed report prepared by Kevin A. Hill, Ph.D. (Appendix, pp. 36-53; R2-28). The plaintiffs also addressed this issue at length in their response brief filed in opposition to the motions to dismiss filed May 15, 2003. It is alleged that the election on the Fourth Congressional District is fraught with racially polarized voting, that Black voters are politically cohesive and that white voters voted as a bloc in the primary to defeat the Black voters' preferred candidate. (Appendix, p. 51; R2-39-20).

JURISDICTION

After the Plaintiffs were allowed to amend their original complaint, the Defendants, except DeKalb County, filed renewed Rule 12(b) motions to dismiss.

The district court had jurisdiction over this matter, alleging federal constitutional and statutory claims, pursuant to 28 U.S.C. §§ 331 and 1343, and the Declaratory Judgment Act, 28 U.S.C. §§ 2201 and 2202. The district court entered an order on August 1, 2003, granting Defendants' motion to dismiss Plaintiffs' Amended Complaint without prejudice. However, contemporaneously with that order the district court entered a final judgment for the Defendants and the case was terminated.

The Eleventh Circuit has jurisdiction as the Plaintiffs timely filed a notice of appeal on August 27, 2003. 28 U.S.C. §§ 1291 and 1292(a)(1). See FRAP 4(a).

This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254.

CONSTITUTIONAL AND STATUTORY PROVISIONS

The First Amendment provides:

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

The Fourteenth Amendment provides, in relevant part:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

The Fifteenth Amendment provides:

> The right of the citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color or previous condition of servitude.

The Voting Rights Act, 42 U.S.C. § 1973(a) provides in relevant part:

> No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgment of the right of any citizen of the United States to vote on account of race or color.

STATEMENT OF OF THE CASE[1]

On August 20, 2002, the State of Georgia conducted a primary election for the Democratic Party of Georgia in the Fourth Congressional District. Two candidates faced each other for the nomination: Cynthia McKinney, a five-term incumbent congresswoman, and Denise Majette, a former DeKalb County State Court judge, who left the bench in order to oppose Ms. McKinney. McKinney won a majority of the votes cast by Democratic voters, but Majette received a majority of votes cast in the primary and was certified as the nominee by the Secretary of State.[2] (Appendix, p. 31 paragraphs 28 and 30; R1-1, R2-28 and R2-30).

1996 marked the beginning of a trend of high black DeKalb County voter turnout, reflecting the County's demographic changes, which also began to affect the County's power relationships. (Appendix, pp. 22-23, 31;

[1] When not cited to the Appendix, the references are to the docket sheet of record in the Eleventh Circuit and the district court.

[2] The certified election returns show that of the 117,670 total votes cast in the August 20, 2002, Fourth Congressional District Primary, Majette received 68,612 votes, and McKinney received 49,058 votes. (Appendix, p. 49; R1-1, R2-28 and R2-30).

R1-1-5). The Georgia and DeKalb County Republican party members conceived a plan to run a candidate in the Democratic Primary, funded that candidate, and then encouraged Republican voters to crossover and vote for that candidate, Denise Majette.[3] (Appendix, pp. 22-23, 31; R1-1-5 and R2-30).

During the month of August 2002, former Republican gubernatorial candidate Guy Milner convened at least one meeting of Republican leaders at his home to promote the Republican crossover for Denise Majette. (R1-1). The Republicans believed that they could force McKinney out with a crossover vote, leaving the Democratic Party without the one candidate who inspired the party faithful to vote. (R1-1). Such a strategy would also have the effect of diluting black voting strength statewide as the Democratic Party has greatly benefitted from a heavy turnout in the Fourth U.S. Congressional District. (R1-1). Many prominent Georgia Republicans contributed to the Majette campaign. (R1-1).

The Fourth Congressional District in the 2002 Primary was comprised of 193 precincts – 188 DeKalb County precincts and 5 Gwinnett County precincts. (Appendix, p. 37-39). 117,670 total votes were cast in the election. Majette votes equaled 686,125. *Id.* McKinney votes equaled 49,058. *Id.* There were 31.23% Republican voters and 68.77% Democratic voters in the District. *Id.* The estimated percentage of Republican voters in the 2002 Primary was 38.62%, while the estimated percentage of Democratic voters was 61.38%. *Id.* The Republican vote for

[3] In fact, Phil Kent, president of the Southern Legal Foundation and crossover proponent, bragged about the successful Republican plot on August 22, 2002, to the *Washington Times*: "It was the white Republicans who had the say so here – me included." (R1-1).

Majette was 87.69% and 12.30% for McKinney. *Id.* The Democratic vote for Majette was 34.18% and 65.81% for McKinney. *Id.* The estimated number of GOP votes received by Majette equaled 42,832, and the estimated number of GOP votes received by McKinney equaled 6,008. *Id.* The estimated number of Democratic votes received by Majette equaled 26,534, whereas the estimated number of Democratic votes received by McKinney equaled 51,088. *Id.* Majette's total vote that was Republican was 61.75%. (Appendix, p. 40). McKinney's total vote that was Democratic was 89.48%. 65.81% of Democrats voted for McKinney.[4] *Id.*

The time and method of qualifying as a candidate, as well as the dates of the primaries, are set by state law. OCGA §§ 21-2-130(1); 21-2-132(c, d, i); 21-2-150 through 154. Georgia uses what is commonly referred to as an "open" primary system. (Appendix, p. 23; R2-35-4 and R2-44-2, footnote 2). Voters do not register or attach themselves officially to a political party, but they are free to vote in either party primary by picking either the Democratic or Republican ballot at the polling place on election day. (Appendix, pp. 23-24; R2-28). A voter is free to vote in one party primary in one election and change to the other party primary in the next election without regard to their party affiliation. *Id.* What this means in Georgia, where voters do not identify a political party affiliation when they register to vote, is that any registered voter may choose to vote in a particular partisan primary and, in

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[4] This data and accompanying estimates are from Tables 1 of the report developed by Kevin Hill, plaintiffs' expert. His report entitled *Report on the August 2002 Open Democratic Primary in the Fourth Congressional District of Georgia* was filed with Plaintiffs' Reply on Motion to Amend Complaint (Appendix, pp. 36-53; R2-28).

doing so, may vote for all candidates for that party's nomination. OCGA § 21-2-224(d). Once having voted in a party's primary during a particular election cycle, the voter may not then, during the same election cycle, vote in another party's primary. *Id.*, OCGA §§ 21-2-216, 21-2-402, 21-5-572. (R2-35-5). Therefore, the Georgia law allows voters that are traditionally Republican to vote in a Democratic Primary in any primary election. (Appendix, p. 38; Hill Report, p. 2; R2-28).

When the Georgia election code was enacted in 1964, the legislature determined that former Ga. Code Ann. § 34-624 would be amended so that voters would not register by party affiliation and could vote in any party's primary election. (1964 Ga. Laws Ex. Sess. 26, 64.) In 2002, thousands of Republicans voted in the Democratic Primary in the Fourth Congressional District, thus effectively controlling the election of the Democratic nominee. It can be calculated that the Republicans who crossed over voted for Denise Majette at a rate of over 9:1, while Democratic voters supported Cynthia McKinney at the rate of 2:1.[5] (Hill Report, p. 2). (R2-28).

The plaintiffs are African-American Democratic registered voters in the Fourth Congressional District of Georgia who voted in the August 20, 2002 Democratic primary. They filed the present action on October 8, 2002, alleging that the crossover voting of Republicans in the 2002 Fourth District Democratic primary impermissibly diminished and interfered with the voting strength of

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[5] Kevin A. Hill, Ph.D., *Report on the August 2002 Open Democratic primary in the Fourth Congressional District of Georgia* (December 30, 2002). (Appendix, pp. 51-52; R2-28).

African-American voters in the district on account of race in violation of the First, Fourteenth and Fifteenth Amendments of the U.S. Constitution and 42 U.S.C. § 1983. (R1-1).

Plaintiffs filed a memorandum in opposition to the motions to dismiss the amended complaint filed by all of the defendants, except the DeKalb County Board of Registration and Elections and Linda Latimore, who filed an answer to the amended complaint. (R2-39 and R2-32). The plaintiffs supported their First Amendment claim. The State of Georgia has commandeered the primary election process for selecting party candidates and has mandated that all voters, regardless of personal political allegiance, have a say in a party's choice of its standard bearers. (Appendix, p. 24; R2-39-8). Georgia's open primary law is not protected by the "time, place, or manner" standard of Article 1, Section 4 of the Constitution.

The plaintiffs assert that the Tenth Amendment cannot save state law prohibited by the Fourteenth and Fifteenth Amendments which empower federal government to intervene in local affairs to protect the rights of minorities. (Appendix, p. 25; R2-39-17). As for the Section 2 claim asserted by plaintiffs, the amended complaint clearly alleges that the open primary scheme has the purpose and effect of denying or abridging the right to vote on account of race in violation of Section 2 of the Voting Rights Act. (Appendix, p. 31; R2-39-19).

The 1983 claim is set out in the amended complaint. The amended complaint alleged that the defendants, acting "under color of state law" have engaged in purposeful discrimination against the plaintiffs for the purpose "of denying the right to vote on account of race." (Appendix, p. 31; R2-39-21).

The court entered an order on August 1, 2003, granting the defendants' motion to dismiss and entered judgment for defendants for costs of the action. (Appendix, p. 19; R2-44 and R2-45). The court found that the amended complaint failed to state a claim as a matter of law. (Appendix, p. 11-18; R2-44-3). The court *sua sponte* granted the dismissal of this action as against the DeKalb defendants. (Appendix, p. 14; R2-44-3). The court stated that "the allegations do not include any factual basis for such an assertion" . . . that the open primary system was implemented with intent of discriminating against African-American voters. (Appendix, p. 17; R2-44-7). "Nothing in the amended complaint could be construed as a denial or abridgment of any of the plaintiffs' right to vote 'on account of race or color' and thus the plaintiffs' Voting Rights Act claim fails as a matter of law." (Appendix, p. 18; R2-44-8).

The First Amendment claim of the amended complaint is succinctly stated in paragraph 23. (Appendix, p. 29). By construing a primary system in which all voters, regardless of personal political affiliation are permitted to vote in the Democratic Primary in the Fourth Congressional District, the State of Georgia has interfered with the right of Plaintiffs and other Democratic voters to choose the nominees of their political party. (Appendix, p. 31; R2-30). The memorandum in opposition to the motions to dismiss states that "in the instant case, the plaintiffs allege that the State of Georgia, by adopting the open primary, has interfered with their right, as members of the Democratic Party, of association." (Appendix, p. 28; R2-39-6). A political party's right to choose its own nominees is core associational activity. (Appendix, p. 29; R2-39-8). "The plaintiffs are asserting their right to join with other Democrats, but not all voters, in the Fourth Congressional

District to select the nominee of their party. The plaintiffs enjoy a constitutionally protected right of political association." (*Id.*)

ARGUMENT AND CITATIONS OF AUTHORITY

1. The Allegations in Plaintiffs' Amended Complaint In Respect To the Claim Under § 2 of the Voting Rights Act Are Sufficient to Defeat a F.R. Civ. P. 12(b)(6) Motion to Dismiss.

The standard of review for the claims dismissed under Rule 12(b)(6) made under § 2 of the Voting Rights Act, 42 U.S.C. § 1973 is de novo.

The lower courts properly stated the general law in respect to examining the merits of a motion to dismiss, which is that "[T]he court must assume that all the factual allegations set forth in the complaint are true. . . . citing *United States. v. Gaubert*, 499 U.S. 315, 327 (1991); *Powell v. Lennon*, 914 F.2d 1459, 1463 (11th Cir. 1990)." (Appendix, p. 14; Order, R2-44). The district court then went a step further, stating that "[m]oreover, in determining whether to grant a Rule 12(b)(6) motion, the court only considers the allegations in the complaint, which it liberally construes in the light most favorable to the plaintiffs. *See Brower v. County of Invo*, 489 U.S. 593, 598 (1989); and *see Burch v. Apalachee Community Mental Health Servs., Inc.*, 840 F.2d 797 (11th Cir. 1988) (*en banc*), *aff'd sub nom., Zinermon v. Burch*, 494 U.S. 113 (1990)." (Appendix, pp. 14, 15; Order, R2-44).

In respect to the Voting Rights Act claim, the district court found that it "fails as a matter of law." (Appendix, p. 18; Order, R2-44). "Nothing in the Amended Complaint could be construed as a denial or abridgement of any of the

plaintiffs' right to vote on account of race or color. There are no factual allegations which, if proved, would establish that any of the plaintiffs had less opportunity to participate and elect the candidate of their choice. Much less are there any factual allegations that such a diminished opportunity is linked to the plaintiffs' race or color." (Appendix, p. 18; Order, R2-44). Also, the district court took judicial notice of the fact that the primary winner was an African-American woman and noted that "'the extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance which may be considered' in analyzing an alleged violation of the Voting Rights Act." (Appendix, p. 18; Order, R2-44). The district court also found that "[c]learly, members of a protected class have been and continue to be elected within the relevant political subdivision of Georgia. . . ." and concluded that the complaint's allegations were "insufficient to state a claim under the Voting Rights Act as a matter of law."

The factual allegations in the amended complaint included the following:

> 1. This is an action to enforce the Voting Rights Act of 1965, 42 U.S.C. § 1973, et seq. This action alleges that the crossover voting of Republicans in the August 2002 Democratic Primary in the Fourth Congressional District of Georgia impermissibly diluted, diminished, and interfered with the rights of African American voters on account of race. . . .
>
> 3. Plaintiffs E. Randel T. Osburn, Linda Dubose, Brenda Lowe Clemons, Dorothy Perry, and Wendell Muhammed are African American Democratic registered voters in the Fourth Congressional District of Georgia who voted in the August 2002 Democratic Party primary.

> 10. The Fourth Congressional District, as of the 2000 Census, is majority African American in terms of population, voting age population. It was also, at the time of the August 2002 Democratic primary, majority African American registered voters. At the time of the August 2002 Democratic primary, an overwhelming majority of African American voters in the Fourth Congressional District were Democrats.
>
> 14. Georgia's adoption of the open primary was done with the intent of discriminating against African American voters, which replicates the effect of the infamous and now outlawed "white primary."
>
> 15. The use of the open primary in the Democratic Primary in the Fourth Congressional District resulted in the defeat of the Democratic candidate preferred by the overwhelming majority of African American voters, who make up the overwhelming majority of Democratic voters in the Fourth Congressional District.

(Appendix, pp. 21, 24, 25; Amended Complaint, R2-30).

In addition, the plaintiffs filed in the district court a report of an expert witness, Kevin A. Hill, which stated, among other findings, that 98% of Republican voters in the Fourth Congressional District are white; that 80% of Democratic voters are African-American; that the winner of the primary, Denise Majette, won 90% of the white vote and 25% of the black vote; that she won 97% of the Republican vote and 33% of the Democratic vote; that Cynthia McKinney won 75% of the black vote and 10% of the white vote, and that she won 3% of the Republican vote and 67% of the Democrat vote. (Appendix, p. 50; R2-28). His conclusion was that Denise Majette was the candidate choice of

Republican and white voters and that Cynthia McKinney was the candidate of choice of Democrat and black voters. (Appendix, p. 51; R2-28).

In determining whether a challenged voting practice violates § 2, a court must decide if the practice "results in a denial or abridgement of the right . . . to vote on account of race or color," *i.e.*, whether minority voters "have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice." 42 U.S.C. § 1973(b). The legislative history of § 2, particularly the Senate Report, indicated that "a variety of factors, depending upon the kind of rule, practice, or procedure called into question," are relevant in determining if it "results" in discrimination. S. Rep. No. 417, 97th Cong. 2d Sess. 28-9 (1982), reprinted in 1982 U.S. Code, Cong. & Admin. News 177.[6]

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[6] The "Senate factors" are:

1. the extent of any history of official discrimination in the state or political subdivision that touched the right of the members of the minority group to register, to vote, or otherwise to participate in the democratic process;

2. the extent to which voting in the elections of the state or political subdivision is racially polarized;

3. the extent to which the state or political subdivision has used unusually large election districts, majority vote requirements, anti-single shot provisions, or other voting practices or procedures that may enhance the opportunity for discrimination against the minority group;

4. if there is a candidate slating process, whether the members of the minority group have been denied access to that process;

5. the extent to which members of the minority group in the state or political subdivision bear the effects of discrimination in such areas as education, employment and health,

(Continued on following page)

There is no requirement that any particular number of the Senate factors be proved, or that a majority of them point one way or the other. Instead, § 2

> requires the court's overall judgment, based on the totality of circumstances and guided by those relevant factors in the particular case, of whether the voting strength of minority voters is, in the language of *Fortson* [*v. Dorsey*, 379 U.S. 433 (1965)] and *Burns* [*v. Richardson*, 384 U.S. 73 (1966)], "minimized or canceled out."

Id. at 29, n.118.

The Senate Report analysis was applied by the Supreme Court in *Thornburg v. Gingles*, 478 U.S. 30, 43-5 (1986). In *Gingles*, a challenge to multi-member legislative districts in North Carolina, the Court analyzed the statutory language and legislative history of § 2 and simplified the application of the Senate factors. It held that:

> the essence of a § 2 claim is that a certain electoral law, practice, or structure, interacts with

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which hinder their ability to participate effectively in the political process;

6. whether political campaigns have been characterized by overt or subtle racial appeals;

7. the extent to which members of the minority group have been elected to public office in the jurisdiction;

8. whether there is a significant lack of responsiveness on the part of elected officials to the particularized needs of the members of the minority group; [and]

9. whether the policy underlying the state or political subdivision's use of such voting qualification, prerequisite to voting, or standard, practice or procedure is tenuous. *See Solomon v. Liberty County Com'rs*, 221 F.3d 1218, 1225-1226 (11th Cir. 2000) ("*Solomon IV*").

> social and historical conditions to cause an inequality in the opportunities enjoyed by African-American and white voters to elect their preferred representatives.

478 U.S. at 476.

Gingles established that to prevail on a claim of vote dilution under § 2, plaintiffs must, at a minimum, satisfy the three now-familiar "*Gingles* factors": (1) that the minority group is "sufficiently large and geographically compact to constitute a majority in a single-member district;" (2) that the minority group is "politically cohesive;" and (3) that sufficient racial bloc voting exists such that the white majority usually defeats the minority's preferred candidate. *Id.*, 478 U.S. at 50-51. *Gingles* also stated that the other factors listed in the Senate Report "are supportive of, but not essential to, a minority voter's claim." 478 U.S. at 48, n.15 (emphasis in original). However, in *Johnson v. DeGrandy*, 512 U.S. 997 (1994), the Court held that "the ultimate conclusions about equality or inequality of opportunity were intended by Congress to be judgments resting on comprehensive, not limited, canvassing of relevant facts. . . . [including] the totality of circumstances." *DeGrandy*, 512 U.S. at 1011.

Gingles was decided in the context of a vote dilution challenge to a multi-member district, but § 2 is not limited to challenging multi-member or at-large election systems, *i.e.*, "No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied. . . ." 42 U.S.C. § 1973(a). For cases which do not fit neatly into the analytical framework set out in *Gingles*, "the test for § 2 violations is generally flexible and fact-intensive." *Brooks v. Miller*, 158 F.3d 1230, 1238 (11th Cir.

1998). In *Brooks*, a challenge to a majority-vote requirement, this Court held:

> Those challenging an electoral device must prove that under the totality of the circumstances, the device 'result[s] in unequal access to the electoral process.' [Citing *Gingles*, 478 U.S. at 46.] Second, a violation of § 2 cannot be established by showing 'the conjunction of an allegedly dilutive electoral mechanism and the lack of proportional representation alone.' *Id.* Finally, plaintiffs must prove the existence of racial bloc voting. *Id.* The results test does not assume it. *Id.*

Brooks, 158 F.3d at 1238.

Section 2 applies not only to permanent structural barriers but also to "practices which, while episodic . . . , result in the denial of equal access to any phase of the electoral process for minority group members." *United States v. Jones*, 57 F.3d 1020, 1023 (11th Cir. 1995), *citing* S. Rep. No. 417, 97th Cong., 2d Sess. 28, 30 (1982) U.S. Code, Cong. & Admin. News 1982 pp. 177, 205-207. *See, e.g., Toney v. White*, 488 F.2d 310 (5th Cir. 1973) (*en banc*) (discriminatory purge of voters from polls violated Section 2) [fn. 4]; *Welch v. McKenzie*, 765 F.2d 1311 (5th Cir. 1985) (fraudulent ballots did not violate § 2). "The relevant inquiry is 'whether, in the particular situation, the [episodic] practice operated to deny the minority plaintiff an equal opportunity to participate and to elect candidates of their [sic] choice.' S. Rep. No. 97-417, 97th Cong., 2d Sess. 30, reprinted in 1982 U.S. Code, Cong. & Admin. News 177, 207, cited in *Welch v. McKenzie*."

Considering the flexibility in approach to a § 2 action, what then were plaintiffs required to allege in their amended complaint in order to avoid dismissal under F.R.

Civ. P. 12(b)(6)? Under modern notice pleading principles the allegations in the amended complaint were adequate to survive a motion to dismiss.

In applying Rule 12(b)(6), "a complaint should not be dismissed for failure to state a claim unless it appears beyond a doubt that the [complainant] can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957).

> Because the Federal Rules embody the concept of liberalized "notice pleading," a complaint need contain only a statement calculated to "give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests." *Conley*, 355 U.S. at 47, 78 S.Ct. at 103; *see also Caribbean Broad. Sys., Ltd. v. Cable & Wireless PLC*, 148 F.3d 1080, 1086 (D.C. Cir. 1998) ("[A] plaintiff need not allege all the facts necessary to prove its claim."). We have observed that the threshold of sufficiency to which a complaint is held at the motion-to-dismiss stage is "exceedingly low." *See In re Southeast Banking Corp.*, 69 F.3d 1539, 1551 (11th Cir. 1995) ("[F]or better or for worse, the Federal Rules of Civil Procedure do not permit district courts to impose upon plaintiffs the burden to plead with the greatest specificity they can.")

United States v. Baxter Intl., 345 F.3d 866, 881 (11th Cir. September 15, 2003).

In the process of applying the liberal construction principle to Rule 12(b)(6) issues, the district court should "presume that general allegations embrace those specific facts that are necessary to support the claim." *United States v. Baxter Intl., supra, citing Nat'l Org. for Women, Inc. v. Scheidler*, 510 U.S. 249, 256 (1994) (*quoting Lujan v.*

Defenders of Wildlife, 504 U.S. 555, 561 (1992)). Moreover, a complaint is not subject to dismissal for failure to state a claim merely because it fails to "plead facts establishing a prima facie case" of discrimination. *United States v. Baxter Intl., supra, citing Swierkiewicz v. Sorema, N.A.*, 534 U.S. 506, 511 (2002). "The liberal notice pleading of Rule 8(a) is the starting point of a simplified pleading system. . . . Rule 8(a) establishes a pleading standard without regard to whether a claim will succeed on the merits. Indeed, it may appear on the face of the pleadings that a recovery is very remote and unlikely but that is not the 'test.'" *Swierkiewicz*, 534 U.S. at 512 (*quoting Scheuer v. Rhodes*, 416 U.S. 232, 236 (1974), *cited in United States v. Baxter Intl., supra*. A court may dismiss a complaint only if it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations. *Hishon v. King & Spalding*, 467 U.S. 69, 73 (1984).

Taking the complaint's allegations as true [*Hishon v. King & Spalding*, 467 U.S. 69, 73 (1984)] and presuming that its general allegations embrace all specific allegations necessary to prove the claim [*United States v. Baxter Intl., supra*], the defendants were given "fair notice of what the plaintiffs claim[s] [were] and the grounds upon which [they] rested," *Conley v. Gibson, supra*. Plaintiffs alleged that the open primary system, in the instance of the 2002 Democratic primary, had the result of allowing non-African-American voters to defeat the candidate of choice of African-American voters. Complaint, ¶¶ 1, 3, 10, 14, and 15. (R2-30). Further, contrary to the state defendant's assertion that plaintiffs had alleged no discriminatory purpose, the amended complaint specifically put defendants on notice of plaintiffs' claim that the open primary system was adopted with the intent of discriminating

against African-American voters, which replicates the effect of the infamous and now outlawed "white primary." Complaint, ¶ 14. (R2-30). Also, the plaintiffs plainly identified the protected class as African-American voters, not as African-American supporters of a defeated candidate, as the state defendants (State of Georgia, Governor Perdue, Secretary of State Cox) aver. Complaint, ¶¶ 3, 14, and 15. (R2-30). In truth, no one in this case was unaware that the gravamen of the § 2 claim was that the open primary allowed the choice of African-American voters to be defeated by the candidate of choice of white voters, which would not have occurred absent the open primary. With or without applying the "exceedingly low" threshold for analyzing the sufficiency of the amended complaint's allegations of a § 2 claim at the motion to dismiss stage [*United States v. Baxter Intl.*, *supra*], those allegations suffice to defeat the motion.

The district court, after stating the principle that only the allegations in the complaint should be considered in the consideration of a Rule 12(b)(6) motion, took judicial notice that the candidate who won the primary was an African-American woman and took the portion of § 2 which states "the extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance which may be considered" in the context of deciding a § 2 claim to hold that the complaint failed to state a claim. That "protected class members elected" circumstance is one of the nine Senate factors to be considered in a § 2 claim. *Gingles*, *supra*, 478 U.S. at 36-37; *Solomon v. Liberty County Com'rs* ("*Solomon IV*"), *supra*, 221 F.3d at 1225-1226. That members of a protected class have been and continue to be elected within the relevant political subdivision does not in itself

determine a § 2 claim. Over the years both the Supreme Court and this court have held that election of members of a protected class do not ipso facto torpedo a § 2 claim. *See, e.g., Gingles, supra*, 478 U.S. at 78; *Davis v. Chiles*, 139 F.3d 1414, 1416 (11th Cir. 1998). At the very worst for plaintiffs' case, evidence of the election of an African-American candidate shifts the burden to plaintiffs to controvert the probative value of such success. *Solomon v. Liberty County Commissioners*, 166 F.3d 1135, 1152 (11th Cir. 1999) ("*Solomon III*"), *citing Gingles*, 478 U.S. at 77 ("In some situations, it may be possible for § 2 plaintiffs to demonstrate that such sustained success does not accurately reflect the minority group's ability to elect its preferred representatives.") Regardless of the probative value of minority electoral success, it is only one factor to be considered in the "comprehensive, not limited, canvassing of relevant facts. . . . [including] the totality of circumstances" which must be employed in a § 2 case [*DeGrandy, supra*] rather than a factor that in itself decides the case; moreover, it is certainly not an element that a court can use to determine a § 2 case by way of a Rule 12(b)(6) motion. That factor was put in § 2 for a reason and re-asserted by the *Gingles* court for the same reason: to prevent a ruling such as that made by the district court in this case. To rule either way, that is, that no members of the protected class have been elected automatically means that the plaintiffs win or that some members of the protected class have been elected automatically means that plaintiffs lose would turn this "one circumstance" on its head, as well as rendering meaningless the jurisprudence developed in countless § 2 cases over the last 21 years, especially the entire body of law in respect to the *Gingles* factors, the "totality of circumstances," and the "comprehensive canvassing of relevant facts" best set out in *Gingles* and *DeGrandy*.

The state defendants (State of Georgia, Governor Perdue, Secretary of State Cox) argue that the factual findings of the District of Columbia District Court in *Georgia v. Ashcroft*, 195 F.Supp.2d 25, 96-97 (2002), a declaratory judgment action under § 5 of the Voting Rights Act, 42 U.S.C. § 1973c, are subject to judicial notice under Fed.R.Evid. 201(b) in this case. State Appellants' Brief at 23. To the contrary, without considering that the findings of fact are from a case with different issues, different burdens of proof, and different parties, those findings from a different court in a different case are "hearsay, and they could not be either judicially noticed or admitted under the public records exception to the hearsay rule." *United States Steel v. Tieco*, 261 F.3d 1275, 1287 (11th Cir. 2001), *citing United States v. Jones*, 29 F.3d 1549, 1554 (11th Cir. 1994) (in turn *citing* Fed.R.Evid. 201 and Fed.R.Evid. 803(8)); *see also Nipper v. Snipes*, 7 F.3d 415, 417-18 (4th Cir. 1993), cited in the Eleventh Circuit Court of Appeals opinions above, *United States Steel*, *supra*, and *United States v. Jones*, 29 F.3d 1549, *supra*.

2. Black Democratic Party Members may assert a First Amendment Right of Association Claim in Order to Protect their Party Primary From a Malicious Republican Crossover.

Freedom of association is not stated directly in the Constitution as a right, but is implied in the First Amendment. *Church of Scientology Flag Services Organization, Inc. v. City of Clearwater*, 756 F.Supp. 1498 (M.D.Fla. 1991), *aff'd in part, vac'd in part on other grounds and rev'd in part on other grounds*, 2 F.3d 1514, *reh. denied*, 12 F.3d 221 (11th Cir. 1993), *cert. denied*, 513 U.S. 807 (1994).

The Supreme Court in *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 460 (1958) noted, "It is beyond debate that freedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect of the liberty assured by the Due Process Clause of the Fourteenth Amendment, which embraces freedom of speech. The ability and opportunity to combine with others to advance one's views has been recognized as a powerful practical means of ensuring the perpetuation of the freedoms the First Amendment has guaranteed individuals as against the government." *New York State Club Association, Inc. v. City of New York*, 487 U.S. 1 (1988). The rights of free speech and free association have been recognized as fundamental and are protected not only against heavy-handed frontal attack, but also from being stifled by more subtle governmental interference. *Gibson v. Florida Legislative Investigation Committee*, 372 U.S. 539 (1963).

A political party has been described as:

> a voluntary association, instituted for political purposes, with the goal of effectuating the will of its *members*. The party's ultimate goal, in the electoral process, is to obtain control of the levers of government by winning elections, so that it may then put into operation its policies and philosophies. . . . In order to accomplish this goal, the party seeks to nominate those candidates who are most likely to win the general election, while remaining most faithful to the party's (i.e., its *members*') policies and philosophies. The party's selection of its candidates therefore is an ultimate and crucial element of the party members' political activities.

Nader v. Schaffer, 417 F.Supp. 837, 847 (D.Conn. 1976) (citations omitted, emphasis added), *aff'd*, 429 U.S. 989 (1976). Political parties "exist to advance their *members'* shared political beliefs." *Colorado Republican Federal Campaign Comm. v. Federal Election Comm'n*, 518 U.S. 604, 629 (1996) (Kennedy, J., concurring and dissenting). (emphasis supplied). The nomination of candidates is the central function of a political party because it is the nominees who, if successful at the general election, will advance the interests of party members. "In the context of particular elections, candidates are necessary to make the party's message known and effective, and vice versa." *Id.* "The freedom to associate necessarily presupposes the freedom to identify the people who constitute the association, and to limit the association to those people only." *Democratic Party of U.S. v. Wisconsin ex rel. La Follette*, 450 U.S. 107, 122 (1981). This is because "the inclusion of persons unaffiliated with a political party may seriously distort its collective decisions[.]" *Id.* A political party's right to choose its own nominees is core associational activity. *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 359-360 (1997). In *Colorado Republican Federal Campaign Committee v. Federal Election Commission*, 518 U.S. 604, 615-616 (1996), the Supreme Court held:

> A political party's independent expression not only reflects its *members'* views about the philosophical and governmental matters that bind them together, it also seeks to convince others to join those *members* in a practical democratic task, the task of creating a government that voters can instruct and hold responsible for subsequent success or failure.

State laws requiring political parties to choose their nominees by direct primary election became common in

the beginning of the Twentieth Century. In *American Party of Texas v. White*, 415 U.S. 767 (1974), the Supreme Court held that "it is too plain for argument . . . that the State . . . may insist that intraparty competition be settled before the general election by primary election or by party convention." *Id.* at 781; *see also Lightfoot v. Eu*, 964 F.2d 865, 872-873 (9th Cir. 1992), *cert. denied*, 507 U.S. 919 (1993) (upholding a California statute that requires political parties to nominate by primary election). Once the States began conducting primary nomination elections, the States necessarily became involved in supervising the conduct of those elections. In particular, the States began to regulate who could vote in party primaries. But the original justification for that regulation was to ensure that the nominees of the parties were elected in a fair and impartial manner by the members of the party. *See Socialist Party v. Uhl*, 155 Cal. 776, 793, 103 P. 181 (1909) ("If the indiscriminate right to vote with any party at a primary were given to electors, whether they were in accord with the principles of the party or not, it would soon tend to destroy all party organization").

In the instant case, the Plaintiffs are asserting their right to join with other Democrats, and not all voters, in the Fourth Congressional District to select the nominee of their party.

"[T]he constitutional rights of those composing the party cannot be disregarded."

The Supreme Court in *California Democratic Party v. Jones*, 530 U.S. 567, 120 S. Ct. 2402, (2002) found that California's adoption of a blanket primary, which permitted voters to vote in political primaries, whether they belonged to that party or not, against the wishes of the

state's political parties, was violative of the associational rights of the political parties.

> [This] Court has recognized that the First Amendment protects "the freedom to join together in furtherance of common political beliefs," "which necessarily presupposes the freedom to identify the people who constitute the association, and to limit the association to those people only," That is to say, a corollary of the right to associate is the right not to associate. "Freedom of association would prove an empty guarantee if associations could not limit control over their decisions to those who share the interests and persuasions that underlie the association's being."

530 U.S. at 574 (citations omitted). Notwithstanding a long judicial history that recognizes that the associational rights guaranteed by the First Amendment in individuals, Ms. Cox asserts in her memorandum that:

> The *California* case recognizes the existence of a First Amendment associational right that *can be asserted and protected only by a political party*. That right does not belong to particular individuals, and cannot be asserted by them, such as Plaintiffs attempt here. Because they have no constitutionally asserted right to assert here, they cannot maintain any claims on this ground.

Not surprisingly, Ms. Cox does not cite a page of the *Jones* opinion wherein the Supreme Court found that the right of association belongs to the group, solely, and is not shared by the members of the organization. She did not because the Court made no such holding. The *Jones* case was brought by the California Republican and Democratic parties, as well as several minor parties. The absence of individual plaintiffs in *Jones* cannot form the basis for the

assertion that individuals have no First Amendment association rights concurrent with the political parties. In fact, the *Jones* case noted in a footnote that: "[T]he constitutional rights of those composing the party cannot be disregarded." *Id.* 530 U.S. at 573, fn.4.

It should be noted that the Court in *Jones* expressly left open the issue of the constitutionality of open primaries ("This case does not require us to determine the constitutionality of open primaries.") 530 U.S. at 577 n.8. The State of Georgia has commandeered the primary election and it is the State's failure to register voters by party and its requirement that all parties open their primaries to any voter who wishes to vote in them that forms the basis of the Plaintiffs' claim. Ms. Cox, in her motion asserts that the change to the open primary took place in 1964, a time of great racial discord in this nation and in this State. On the eve of the passage of the Voting Rights Act, the State of Georgia changed its election law. Plaintiffs intend to prove that it was done for the purpose of disenfranchising Black voters. It has waited these many years, like an abandoned mine waiting just below the water line. That electoral mine went off on August 20, 2002 in the Fourth Congressional District.

Ms. Cox asserts that "[b]ecause no voter in Georgia is registered by party, there is no way to establish that any *Republican* voter crossed over and *maliciously interfered* in the Democratic Primary [sic]." In response, the Plaintiffs would first state that this Court should not consider allegations contained in briefs and legal memoranda on a motion to dismiss. *Henthorn v. Department of Navy*, 29 F.3d 682, 688 (D.C. Cir. 1994). As indicated previously, all well pleaded facts must, for the purpose of the motion, be accepted. However, the failure of the State of Georgia to

require voters to state their party preference at the time of registration is not dispositive of the Plaintiffs' claim. The Plaintiffs are prepared to demonstrate their case through evidence of voting behavior that the Democratic primary in the Fourth Congressional District was hijacked by Republicans who crossed over. The Supreme Court has emphasized that the focus should be on voter behavior, not voter registration. *See Easley v. Cromartie*, 532 U.S. 234, 245 (2001).

The right to associate and to choose a nominee reflective of the membership of the parties is a fundamental right and any infringement of that right by the state should be subject to strict scrutiny. The Plaintiffs should be permitted to prove that the open primary system is not narrowly tailored to serve a compelling state interest.

CONCLUSION

This case presents important questions concerning the Voting Rights Act and the First, Fourteenth and Fifteenth Amendments to the United States Constitution. The Eleventh Circuit opinion does not even directly acknowledge that this case involves a malicious crossover claim. A malicious crossover was an underlying issue in *California Democratic Party v. Jones, supra*, that was not decided therein but should now be addressed by this Court.[7] As a

[7] "[T]he Ninth Circuit cited testimony that the prospect of malicious crossover voting, or raiding, is slight, and that even though the numbers of 'benevolent' crossover voters were significant, they would be determinative in only a small number of races." *California Democratic Party v. Jones*, 530 U.S. at 579.

malicious Republican crossover is here very real and likely to occur again, the Plaintiffs are entitled to a remedy. "[H]aving a party's nominee determined by adherents of an opposing party is far from remote, it is a clear and present danger." *California Democratic Party v. Jones*, 530 U.S. at 578.

Respectfully submitted,

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[PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 03-14349

D.C. Docket No. 02-02721-CV-CAP-1

E. RANDEL T. OSBURN, LINDA DUBOSE, BRENDA LOWE CLEMONS, DOROTHY PERRY, WENDELL MUHAMMAD,

Plaintiffs-Appellants,

versus

CATHY COX, Secretary of State of Georgia, LINDA LATIMORE, Dekalb County Elections Supervisor, LYNN LEDFORD, Gwinnett County Elections Supervisor, GEORGIA DEMOCRATIC PARTY, STATE OF GEORGIA, et al.

Defendants-Appellees,

DENISE MAJETTE, et al.,

Defendants.

Appeal from the United States District Court for the Northern District of Georgia

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(Filed May 17, 2004)

Before EDMONDSON, Chief Judge, HULL, Circuit Judge, and BUCKLEW*, District Judge:

BUCKLEW, District Judge:

On August 20, 2002, the only two individuals listed on the ballot in the Democratic Primary election for the United States Congress in the Fourth District of Georgia, which spans Dekalb and Gwinnett Counties, were Denise Majette and incumbent Congresswoman Cynthia McKinney, both of whom are African-American women. Majette defeated incumbent Congresswoman McKinney by over 15,000 votes. On November 5, 2002, Majette won the general election and a seat in the United States Congress.

Five registered voters from the Fourth Congressional District of Georgia who voted in the Democratic Primary filed a complaint in the district court raising various challenges to Georgia's primary election system. Georgia's primary election system does not require voters to register by party affiliation. Once registered to vote, a voter may choose in which political party's primary to vote on the day of the election by requesting the appropriate ballot. In other words, a Republican voter can lawfully vote in a Democratic primary and vice versa. Furthermore, that same Republican voter could vote in the Republican Party's Primary in the next election. In this challenge to the Georgia "open primary," as this form of primary election is called, the Plaintiffs originally named as Defendants the Secretary of State of Georgia, DeKalb County Elections Supervisor, Gwinnett County Elections Supervisor, the Georgia Democratic Party, the Georgia Republican

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* Honorable Susan C. Bucklew, United States District Judge for the Middle District of Florida, sitting by designation.

Party, the DeKalb County Republican Party, and Congresswoman Majette.

Most of the Defendants moved to dismiss the complaint. Prior to the district court ruling on the motions to dismiss, the Plaintiffs voluntarily dismissed the Georgia Republican Party, the DeKalb County Republican Party and Congresswoman Majette from the case and moved to amend their complaint. The Plaintiffs sought to amend the complaint to restate their claims and to add the State of Georgia, Governor of the State of Georgia, DeKalb County Board of Elections and Registration, and Gwinnett County Board of Elections and Registration as Defendants. The district court granted the Plaintiffs' motion to amend, and all Defendants except Defendants DeKalb County Supervisor of Elections and DeKalb County Board of Elections and Registration (collectively "DeKalb Defendants") then moved to dismiss the amended complaint.

The gravamen of the Plaintiffs' amended complaint was that the Georgia and DeKalb County Republican party members conceived a plan to run a candidate (Majette) in the Democratic Primary, funded that candidate, and then encouraged Republican voters to crossover and vote for that candidate. The amended complaint alleged that, as a result, the preferred candidate of Democratic voters, McKinney, was defeated by the vote of the Republicans who crossed over and voted in the Democratic primary. Plaintiffs alleged that the crossover voting of the Republicans impermissibly diminished and interfered with the voting strength of African-American voters in the Fourth Congressional District on account of race.

The amended complaint set forth three separate causes of action: (1) that the open primary violated Plaintiffs' equal

protection rights under the Fourteenth Amendment and their rights under the Fifteenth Amendment, as protected by the Civil Rights Act, 42 U.S.C. § 1983 (Count I); (2) that Georgia's open primary system violated the Plaintiffs' associational rights under the First Amendment as protected by the Civil Rights Act, 42 U.S.C. § 1983 (Count II); and (3) that the open primary violated Plaintiffs' rights under Section 2 of the Voting Rights Act, 42 U.S.C. § 1973 (Count III). Plaintiffs sought declaratory and injunctive relief in their amended complaint. Specifically, Plaintiffs sought, among other remedies, to have the results of the August 2002 Democratic Primary and the November 2002 General Election for the Fourth Congressional District declared void, to have Georgia's present open primary system declared violative of Section 2 of the Voting Rights Act, and to have the use of the open primary in the Democratic primaries in Fourth Congressional District of Georgia enjoined.

On August 1, 2003, the district court issued an order, granting the motions to dismiss and dismissing the case without prejudice against all of the Defendants, and entered judgment for the Defendants.[1] The district court determined that the Plaintiffs had no standing to raise a First Amendment claim and had presented no facts sufficient to support any showing of violations of either their Fourteenth or Fifteenth Amendment rights. The court rejected the Plaintiffs' Voting Rights Act claim as well,

[1] Although the DeKalb Defendants did not file a motion to dismiss, the district court noted that the DeKalb Defendants raised the defense of failure to state a claim in their answer and *sua sponte* granted dismissal of the action as against the DeKalb Defendants because the district court found that the amended complaint failed to state a claim as a matter of law.

finding that the Plaintiffs' allegations were insufficient to state a claim for denial or abridgement of the right to vote. Plaintiffs now appeal.

I.

Plaintiffs allege that Georgia's open primary system infringed upon their First Amendment right of association.[2] Plaintiffs argue that by having a primary system in which all voters, regardless of personal political affiliation are permitted to vote in the Democratic Primary in the Fourth Congressional District, the State of Georgia has interfered with the right of the Plaintiffs and other Democratic voters to choose the nominees of their political party.

The district court interpreted the Supreme Court's decision in *California Democratic Party v. Jones,* 530 U.S. 567, 120 S. Ct. 2402 (2000),[3] to hold that the standing to

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[2] The First Amendment to the U.S. Constitution provides:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

U.S. CONST. amend. I. The Supreme Court has recognized "as implicit in the right to engage in activities protected by the First Amendment a corresponding right to associate with others in pursuit of a wide variety of political, social, economic, educational, religious, and cultural ends." *Roberts v. United States Jaycees,* 468 U.S. 609, 622, 104 S. Ct. 3244, 3252 (1984).

[3] The Supreme Court in *Jones* concluded that California's adoption of a blanket primary, which permitted all voters to vote in the primary for any candidate regardless of the candidate's political affiliation, against the wishes of the state's political parties, was violative of the

(Continued on following page)

challenge a state's regulation of a political party's primary belongs only to the party itself, and, therefore, the Plaintiffs in this case lacked standing to bring their First Amendment right of association claim. Plaintiffs argue that the Supreme Court in *Jones* does not hold that the standing to bring a right of association claim belongs solely to the political party. Plaintiffs assert that the Supreme Court has not held, nor even implied, that individuals have no First Amendment associational rights concurrent with the political parties.

Although the Supreme Court has not explicitly said that only the party proper, and not individual members of the party, may challenge a state's regulation of a political party's primary, the case law points toward such a result. In *Democratic Party of the United States v. Wisconsin,* 450 U.S. 107, 101 S. Ct. 1010 (1981), the Supreme Court upheld a challenge by the national Democratic Party to Wisconsin's election laws. The election laws at issue essentially forced the Democratic Party to seat at their conventions delegates chosen in state selection processes that did not conform to the party's national charter limiting participation in choosing Democratic delegates to members of the Democratic Party. *Id.* at 109-11, 101 S. Ct. at 1012-14. The Supreme Court held that the Wisconsin election laws unconstitutionally infringed on the Democratic Party's right "to define their associational rights by limiting those who could participate in the processes leading to the selection of delegates to their National Convention." *Id.* at 122, 101 S. Ct. at 1019.

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associational rights of the political parties. *Jones,* 530 U.S. at 586, 120 S. Ct. at 2414.

In *Tashjian v. Republican Party of Connecticut,* 479 U.S. 208, 107 S. Ct. 544 (1986), the Supreme Court examined a challenge by the Republican Party of Connecticut to Connecticut's *closed* primary system, in which the Republican Party was not allowed to invite independent voters (i.e., voters not affiliated with any political party) to participate in the Republican primary and to help choose the Republican candidate. The Court held that the First Amendment protects a party's right to invite independent voters to participate in the primary. *Id.* at 224, 107 S. Ct. at 554.

While these cases have upheld a political party's right to both expand and limit the persons that the party wishes to include in its primary elections, it was the political party in each case that was entitled to decide who would be involved in the decision making process, not individual members of the party. In fact, there are no cases directly on point, i.e., no cases in which individual plaintiffs alone have been found to be entitled to such rights.

Instead, the case law weighs against an individual's right to assert such a claim and is buttressed by the fact that the relief that Plaintiffs seek, i.e., to limit the voters who could participate in a Democratic primary to those who Plaintiffs consider to be "Democratic voters," would likely be held unconstitutional if challenged by the state political party. The Supreme Court in *Tashjian* held that a state may not limit who a party may invite to participate in its primary election. *Id.* at 225, 107 S. Ct. at 554. Therefore, the remedy sought by Plaintiffs imposing such a limit on the Democratic Party of Georgia would likely be unconstitutional. *See id.* Accordingly, this Court finds that the Plaintiffs lack standing to assert their First Amendment claim.

II.

Plaintiffs' amended complaint alleged that the State of Georgia's adoption of the open primary system was done intentionally and for the purpose of discriminating against African-American voters, whose membership includes the Plaintiffs. The district court found that the Plaintiffs had not presented facts sufficient to support any showing of violations of either their Fourteenth or Fifteenth Amendment rights.

To establish a Fourteenth Amendment claim, the Plaintiffs must not only plead that they lack the equal opportunity to participate in the political process, but must also demonstrate that this inequality results from the open primary system and that a racially discriminatory purpose underlies that system. *See Johnson v. DeSoto,* 204 F.3d 1335, 1345 (11th Cir. 2000) (citing *Lucas v. Townsend,* 967 F.2d 549, 551 (11th Cir. 1992)).

In conjunction with their Fourteenth Amendment claim, Plaintiffs also raise a claim under the Fifteenth Amendment[4] to the U.S. Constitution. The Supreme Court has recognized that the Fifteenth Amendment protects the right to register and to vote, but it has never held or even suggested that vote dilution violates the Fifteenth Amendment. *Reno v. Bossier Parish Sch. Bd.,* 528 U.S. 320, 334 n.3, 120 S. Ct. 866, 875 n.3 (2000).

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[4] The Fifteenth Amendment to the U.S. Constitution provides:

> The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color or previous condition of servitude.

U.S. CONST. amend. XV, § 1.

Plaintiffs do not allege that they were prevented from registering to vote or from voting at all. Instead they allege that they were outvoted in relation to selecting the candidate of their preference. The claim does not identify the violation of any fundamental right in relation to voting. On its face, the amended complaint fails to state a claim for either a Fourteenth or Fifteenth Amendment violation. *See GJR Investments, Inc. v. County of Escambia,* 132 F.3d 1359, 1367 (11th Cir. 1998)(requiring that a § 1983 plaintiff allege with some specificity the facts that make out its claim); *see also Gonzalez v. Reno,* 325 F.3d 1228, 1235 (11th Cir. 2003) (discussing heightened pleading requirement for civil rights cases).

III.

Plaintiffs argue that Georgia's open primary system has the purpose and effect of denying or abridging their vote on account of race in violation of Section 2 of the Voting Rights Act. Plaintiffs contend that the amended complaint clearly states that black voters are politically cohesive and that white voters voted in a bloc in the primary to defeat the black voters' preferred candidate.

The district court rejected this claim finding that the Plaintiffs' allegations failed to state a claim for denial or abridgement of the right to vote. The district court also noted that both former Congresswoman McKinney and incumbent Congresswoman Majette are African-American and that factor was one that belied the Plaintiffs' legal claims of discrimination in the electoral system.

Section 2 of the Voting Rights Act states, in relevant part, that "[n]o voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed

or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color." 42 U.S.C. § 1973(a).

To establish a violation of Section 2, this Court has held that:

> [A] plaintiff must prove invidious discrimination in order to establish a violation of [S]ection 2 of the Voting Rights Act. Specifically, the plaintiff may prove *either:* (1) discriminatory intent on the part of legislators or other officials responsible for creating or maintaining the challenged system; *or* (2) objective factors that, under the totality of the circumstances, show the exclusion of the minority group from meaningful access to the political process due to the interaction of racial bias in the community with the challenged voting scheme.

Nipper v. Smith, 39 F.3d 1494, 1524 (11th Cir. 1994); *see also Brooks v. Miller,* 158 F.3d 1230, 1237-38 (11th Cir. 1998). It is Plaintiffs' burden to show on the face of their amended complaint either a discriminatory purpose or effect demonstrating that members of the minority community contained within the Fourth Congressional District are unable to equally participate in the political processes leading to the nomination or election of a candidate of choice. Plaintiffs allege no discriminatory purpose, but instead claim there is a discriminatory effect in the operation of the open primary system.

A violation of Section 2 is established only if, based on the totality of the circumstances, minority plaintiffs can prove that they "have less opportunity than other members of the electorate to participate in the political process

and to elect representatives of their choice." 42 U.S.C. § 1973(b); *see also Chisom v. Roemer,* 501 U.S. 380, 397, 111 S. Ct. 2354, 2365 (1991) ("the inability to elect representatives of their choice is not sufficient to establish a [Section 2] violation unless, under the totality of the circumstances, it can also be said that the members of the protected class have less opportunity to participate in the political process").

The facts alleged by Plaintiffs, i.e., that Republican voters crossed-over and voted for Majette rather than McKinney, do not demonstrate a violation of Section 2 of the Voting Rights Act. The Plaintiffs have not alleged facts to support a claim that the minority group has been excluded from meaningful access to the political process due to the interaction of racial bias in the community with the challenged voting system. *See Nipper,* 39 F.3d at 1524.

AFFIRMED.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

E. RANDEL T. OSBURN; LINDA DUBOSE; BRENDA LOWE CLEMONS; DOROTHY PERRY; and WENDELL MUHAMMAD,

Plaintiffs,

v.

STATE OF GEORGIA; SONNY PERDUE, Governor of Georgia; CATHY COX, Secretary of State of Georgia; DEKALB COUNTY BOARD OF ELECTIONS AND REGISTRATION; GWINNETT COUNTY BOARD OF ELECTIONS AND REGISTRATION; LINDA LATIMORE, DeKalb County Supervisor of Elections; LYNN LEDFORD, Gwinnett County Supervisor of Elections; and GEORGIA DEMOCRATIC PARTY,

Defendants.

CIVIL ACTION

NO. 1:02-CV-2721-CAP

ORDER

(Filed Aug. 1, 2003)

Congresswoman Denise Majette and former Congresswoman Cynthia McKinney were the only two individuals listed on the ballot in the Democratic Primary election for the United States Congress in the Fourth

District of Georgia on August 20, 2002. In that primary contest, Representative Majette defeated former Representative McKinney[1] by more than 15,000 votes. Representative Majette went on to win the general election and a seat in the United States Congress. Five voters from the district who chose to vote in the Democratic Primary[2] now contest the outcome of that primary. These plaintiffs seek equitable relief for purported violations of the United States Constitution and the Voting Rights Act. This matter is currently before the court on a number of motions to dismiss and the plaintiffs' motion for an extension of time to file a response.

The plaintiffs' motion for an extension of time to file [Doc. No. 36-1] is GRANTED *nunc pro tunc.* The court has received and considered the plaintiffs' response in reaching its decision on the motions to dismiss. Further, for the reasons set forth below, the State of Georgia's motion to dismiss [Doc. No. 35-1] is GRANTED; The Gwinnett County Board[3] of Registrations and Elections' motion to

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[1] Ms. McKinney was the incumbent in the race.

[2] The State of Georgia does not require its citizens to declare a party affiliation when they register to vote or at any other time. Georgia voters participate in "open" primaries. Thus, Georgia voters choose between party ballots in every primary election. In Georgia, a registered voter does not approach the poll as a Democrat, a Republican, a Libertarian, a member of the Green Party or anything other than a registered voter. The voter's choice is made when the voter selects a ballot for the particular primary. Georgia voters are not required to seek leave to vote in a particular party primary from their government or the respective political parties. Nor must they provide notice of such a decision. Instead, Georgia has only limited voters to the selection of a single party primary for each election. A voter may choose to vote in a different political party's primary in the next election. O.C.G.A. § 21-2-224(d).

[3] Including defendant Ledford in her official capacity.

dismiss [Doc. No. 40-1] is GRANTED; and the Georgia Democratic Party's motion to dismiss [Doc. No. 33-1] is GRANTED. Though defendant Latimore and the DeKalb County Board of Elections and Registration (DeKalb defendants) have not filed a motion to dismiss, the court notes they raised the defense of failure to state a claim in their answer. Accordingly, because the court finds that the Amended Complaint fails to state a claim as a matter of law, the court *sua sponte* grants the dismissal of this action as against the DeKalb defendants. This action is dismissed without prejudice against all defendants for failure to state a claim upon which relief can be granted. The other pending motion [Doc. No. 34-1] is rendered MOOT and is, therefore, DENIED.

I. LEGAL DISCUSSION

A. Rule 12(b)(6) Dismissal Standard

The defendants have filed a motion to dismiss for failure to state a claim upon which relief can be granted pursuant to Fed.R.Civ.P. 12(b)(6). A Rule 12(b)(6) motion questions the legal sufficiency of a complaint; therefore, in assessing the merits of a Rule 12(b)(6) motion, the court must assume that all the factual allegations set forth in the complaint are true. *See United States v. Gaubert*, 499 U.S. 315, 327, 111 S. Ct. 1267 (1991); *Powell v. Lennon*, 914 F.2d 1459, 1463 (11th Cir. 1990). Moreover, in determining whether to grant a Rule 12(b)(6) motion, the court only considers the allegations in the complaint, which it liberally construes in the light most favorable to the plaintiffs. *See Brower v. County of Inyo*, 489 U.S. 593, 598, 109 S. Ct. 1378 (1989); *and see Burch v. Apalachee Community Mental Health Servs., Inc.*, 840 F.2d 797 (11th Cir.

1988) (en banc), aff'd sub nom., *Zinermon v. Burch*, 494 U.S. 113, 110 S. Ct. 975 (1990).

Generally, "a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *In re Johannessen*, 76 F.3d 347, 349 (11th Cir. 1996) (quoting *Conley v. Gibson*, 355 U.S. 41, 45-6, 78 S. Ct. 99 (1957)). Thus, a motion to dismiss will be denied unless it appears beyond all doubt that the plaintiff can prove no set of facts in support of his claims that would entitle him to relief. *See Luckey v. Harris*, 860 F.2d 1012, 1016 (11th Cir. 1988); *see also Hishon v. King & Spaulding*, 467 U.S. 69, 104 S. Ct. 2229 (1984). In any event, the court is authorized to dismiss the complaint "on the basis of a dispositive issue of law." *Neitzke v. Williams*, 490 U.S. 319, 326, 109 S. Ct. 1827, 1832 (1989).

In civil rights cases, the complaint must allege the relevant facts "with some specificity." *GJR Investments, Inc. v. County of Escambia*, 132 F.3d 1359, 1367 (11th Cir. 1998); *see also Gonzalez v. Reno*, 325 F.3d 1228, 1235 (2003). More than mere conclusory notice pleading is necessary and a "complaint will be dismissed as insufficient where the allegations it contains are vague and conclusory." *Fullman v. Graddick*, 739 F.2d 553, 556-57 (11th Cir. 1984); *Gonzalez*, 325 F.3d at 1235. Moreover, in considering a motion to dismiss, the court only accepts "well-pleaded facts" and "reasonable inferences drawn from those facts." *Oladeinde v. City of Birmingham*, 963 F.2d 1481, 1485 (11th Cir. 1992). General assertions and unsupported "conclusions of law or of mixed fact and law have long been recognized not to prevent a Rule 12(b)(6) dismissal." *Marsh v. Butler County*, 268 F.3d 1014, 1036

n. 16 (11th Cir. 2001). Further, courts "generally accord . . . official conduct a presumption of legitimacy." *United States Dep't of State v. Ray*, 502 U.S. 164, 179, 112 S.Ct. 541, 550 (1991).

B. First Amendment Claims

The plaintiffs allege that the open primary system permits voters who are not "true" Democrats to vote in Democratic Primaries. The plaintiffs claim that this system deprives them of their associational right to vote in a primary with real, true-blue Democrats exclusively. Essentially, the plaintiffs assert a right to exclude voters from the Democratic Primary.

The plaintiffs lack standing to assert their freedom of association claim. The court holds, as a matter of law, that the associational rights the plaintiffs have attempted to assert belong to the association and not its members. *See generally California Democratic Party v. Jones*, 530 U.S. 567, 574, 120 S.Ct. 2402, 2408 (2002) ("Freedom of association would prove an empty guarantee if associations could not limit control over their decisions to those who share the interests and persuasions that underlie the association's being.") (citations omitted and emphasis added); *and Democratic Party v. Wisconsin*, 450 U.S. 107, 101 S.Ct. 1010 (1981).

Put differently, the right of the Democratic Party to regulate its membership and the participation in its decisionmaking process is a right that can be asserted only by the party proper and not by individual members of the party. The party alone has the power and right to define and defend the contours of its membership. Though federal and state laws may affect that power and the

related right, no law extends that right to the individual members of the party. As far as the law is concerned, the identity of "real" Democrats is not for the plaintiffs to define. Accordingly, the plaintiffs' First Amendment associational rights claims fail as a matter of law and are due to be dismissed.

C. Fourteenth and Fifteenth Amendment Claims

The Amended Complaint broadly and vaguely asserts that the open primary system was implemented with the intent of discriminating against African American voters.[4] The allegations do not include any factual basis for such an assertion.

Here, the Amended Complaint makes no factual allegations regarding the intent of Georgia's General Assembly in passing into law the open primary system. The General Assembly in establishing the open primary is entitled to a presumption of legitimacy. *See Ray*, 502 U.S. at 179, 112 S.Ct. at 550; *Gonzalez*, 325 F.3d at 1235. The lack of meaningful factual allegations is fatal to the plaintiffs' claims. Put simply, none of the factual allegations in the complaint support a reasonable inference that any of the defendants took any action whatsoever on account of any persons race or color or for the purpose of discriminating against any person on the basis of their race or color. Accordingly, the plaintiffs have failed, as a

[4] *See* Amended Complaint [Doc. No. 30-1] at ¶¶ 1, 14, and 15.

matter of law, to state a claim for a violation of their rights secured by the Fourteenth and Fifteenth Amendments.[5]

D. Voting Rights Act Claims

The plaintiffs' Voting Rights Act claim also fails as a matter of law. Nothing in the Amended Complaint could be construed as a denial or abridgement of any of the plaintiffs' right to vote on account of race or color. There are no factual allegations which, if proved, would establish that any of the plaintiffs had less opportunity to participate and elect the candidate of their choice. Much less are there any factual allegations that such a diminished opportunity is linked to the plaintiffs' race or color.

Additionally, the court takes judicial notice of the fact that Congresswoman Majette is, like former Congresswoman McKinney, an African American[6] woman. The court notes that "the extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance which may be considered" in analyzing an alleged violation of the Voting Rights Act, 42 U.S.C. § 1973(b). Clearly, members of a protected class have been and continue to be elected within the relevant political subdivision of Georgia. The allegations of the complaint are insufficient to state a claim pursuant to the Voting Rights Act as a matter of law. Accordingly, because the plaintiffs' Amended Complaint fails to state a claim upon which relief can be granted, the motion to dismiss is due to be granted.

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[5] The plaintiffs' 42 U.S.C. § 1983 claim fails as a matter of law as such a claim is dependent upon a showing of a constitutional violation.

[6] The plaintiffs are, likewise, African Americans.

II. CONCLUSION

For the reasons set forth above, the plaintiffs' motion for an extension of time to file [Doc. No. 36-1] is GRANTED; the State of Georgia's motion to dismiss [Doc. No. 35-1] is GRANTED; The Gwinnett County Board of Registrations and Elections' motion to dismiss [Doc. No. 40-1] is GRANTED; the Georgia Democratic Party's motion to dismiss [Doc. No. 33-1] is GRANTED; and the other pending motion [Doc. No. 34-1] is DENIED. This action is dismissed without prejudice as against all defendants.

SO ORDERED, this 1st day of August, 2003.

/s/ Charles A. Pannell, Jr.
CHARLES A. PANNELL, JR.
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

E. RANDEL T. OSBURN,
LINDA DUBOSE,
BRENDA LOWE CLEMONS,
DOROTHY PERRY, and
WENDELL MUHAMMED,

Plaintiffs,

vs. CASE NO. 1:02CV2721-CAP

STATE OF GEORGIA,
SONNY PERDUE, Governor of Georgia,
CATHY COX, Secretary of State of Georgia,
DEKALB COUNTY BOARD OF ELECTIONS AND REGISTRATION, GWINNETT COUNTY BOARD OF ELECTIONS AND REGISTRATION, LINDA LATIMORE, DeKalb County Supervisor of Elections,
LYNN LEDFORD, Gwinnett County Supervisor of Elections, and GEORGIA DEMOCRATIC PARTY,

Defendants.

AMENDED COMPLAINT FOR EQUITABLE RELIEF UNDER THE VOTING RIGHTS ACT AND THE UNITED STATES CONSTITUTION

JURISDICTION AND VENUE

1.

This is an action to enforce the Voting Rights Act of 1965, 42 U.S.C. § 1973, et seq. This action alleges that the crossover voting of Republicans in the August 2002 Democratic Primary in the Fourth Congressional District of Georgia impermissibly diluted, diminished, and interfered

with the rights of African-American voters on account of race. This action also alleges that the maintenance of an open Democratic primary by the State of Georgia and malicious Republican crossover voting in the August 2002 Democratic Primary in the Fourth Congressional District of Georgia violated the association rights preserved under the First Amendment to the United States Constitution and guaranteed to the Plaintiffs through the Fourteenth and Fifteenth Amendments and in contravention of the rights protected by 42 U.S.C. § 1983. The complaint also alleges intentional discrimination by the Defendants against the Plaintiffs and other African-American voters in the Fourth Congressional District of Georgia on account of their race.

2.

This Court has jurisdiction to hear this matter pursuant to 28 U.S.C. § 1331, 1343, and 1367. This action for declaratory and injunctive relief is authorized by 28 U.S.C. § 2201 and 2202, and by Rules 57 and 65, Fed. R. Civ. P. Venue is proper in the Northern District of Georgia pursuant to 28 U.S.C. 1391(d).

THE PARTIES

3.

Plaintiffs E. RANDEL T. OSBURN, LINDA DUBOSE, BRENDA LOWE CLEMONS, DOROTHY PERRY, and WENDELL MUHAMMED are African-American Democratic registered voters in the Fourth Congressional District of Georgia who voted in the August 2002 Democratic Party primary.

4.

Defendant STATE OF GEORGIA is one of the 50 United States of America and its laws require that the state's major political parties' candidates be chosen in open primaries. It is under the auspices and control of the State of Georgia that the Democratic Primary in the Fourth Congressional District of Georgia is conducted. Defendant SONNY PERDUE is the Governor of Georgia as of January 13, 2003.

5.

Defendant CATHY COX is the Secretary of State of Georgia and is sued herein in her official capacity. Ms. Cox has the obligation under Georgia law to overseeing elections in the state and, consequently, in the Fourth Congressional District of Georgia. She also has the duty of consolidating the returns from the counties that comprise the Fourth Congressional District of Georgia and certifying election results. Complete relief cannot be accorded in this matter without the presence of Ms. Cox.

6.

Defendant LINDA LATIMORE is the DeKalb County Supervisor of Elections and is responsible for conducting elections in that county, one of two counties comprising the Fourth Congressional District of Georgia. Ms. Latimore is also responsible for registering voters in DeKalb County and keeping records of those registrations. Complete relief cannot be accorded in this matter without the presence of Ms. Latimore. The DEKALB COUNTY BOARD OF ELECTIONS AND REGISTRATION is the

legal entity created by state law to conduct and oversee elections in DeKalb County, Georgia.

7.

Defendant LYNN LEDFORD is the Gwinnett County Supervisor of Elections and is responsible for conducting elections in that county, the other of the two counties comprising the Fourth Congressional District of Georgia. Ms. Ledford is also responsible for registering voters in Gwinnett County and keeping records of those registrations. Complete relief cannot be accorded in this matter without the presence of Ms. Ledford. The GWINNETT COUNTY BOARD OF ELECTIONS AND REGISTRATION is the legal entity created by state law to conduct and oversee elections in Gwinnett County, Georgia.

8.

Defendant GEORGIA DEMOCRATIC PARTY is a political party based in Georgia. The nomination of candidates for the Georgia Democratic Party, including the Democratic candidate for the Fourth Congressional District of Georgia, is conducted for the Georgia Democratic Party under Georgia law by the State of Georgia.

FACTS COMMON TO ALL COUNTS

9.

On August 20, 2002, the State of Georgia conducted a primary election for the Democratic Party of Georgia in the Fourth Congressional District. Under Georgia law, no voter is registered by political party and all voters may

vote in any political parties' primary regardless of personal political affiliation.

10.

The Fourth Congressional District, as of the 2000 Census, is majority African-American in terms of population and voting age population. It was also, at the time of the August 2002 Democratic primary, majority African-American in registered voters. At the time of the August 2002 Democratic primary, an overwhelming majority of African-American voters in the Fourth Congressional District were Democrats.

11.

In the August 2002 Democratic Primary, two candidates faced each other for the Democratic Party nomination for the Fourth Congressional District: Cynthia McKinney and Denise Majette. McKinney won a majority of votes cast by Democratic voters. However, because of votes cast by Republican voters in the Democratic primary, Majette received a majority of votes cast in the primary and was certified by the Secretary of State as the nominee of the Georgia Democratic Party in the Fourth Congressional District. Majette was placed on the ballot for the November 2002 general election as the Democratic nominee in the Fourth Congressional District and won the general election.

12.

As of the 2002 election there were not enough Republican voters in the Fourth Congressional District to ensure

the election of a Republican candidate at the general election. The crossover of Republican voters into the Democratic primary was orchestrated by the Republican Party of Georgia and the DeKalb Republican Party to ensure the nomination of a candidate who views were more in tune with the philosophies of the Republican Party. Members of the Georgia Republican Party and the DeKalb Republican Party conceived and orchestrated a plan to run such a candidate in the Democratic Primary, funded that candidate, organized and encouraged the Republican voters in the Fourth District to vote for that candidate, Denise Majette.

COUNT I

VIOLATION OF PLAINTIFFS' RIGHTS UNDER THE FOURTEENTH AND FIFTEENTH AMENDMENTS

13.

Plaintiffs repeat and reallege the allegations of paragraphs 1 through 12 as if set forth herein.

14.

Georgia's adoption of the open primary was done with the intent of discriminating against African-American voters, which replicates the effect of the infamous and now outlawed "white primary."

15.

The use of the open primary in the Democratic Primary in the Fourth Congressional District resulted in the defeat of the Democratic candidate preferred by the

overwhelming majority of African-American voters, who make up the overwhelming majority of Democratic voters in the Fourth Congressional District.

16.

The State of Georgia, DeKalb County Board of Elections And Registration, Gwinnett County Board of Elections and Registration, Cathy Cox, Linda Latimore and Lynn Ledford, acting under color of law, conducted the open Democratic Primary in the Fourth Congressional district which contravened Plaintiffs' rights under the Fourteenth and Fifteenth Amendments and guaranteed pursuant to 42 U.S.C. 1983.

17.

Plaintiffs have suffered, are suffering, and will continue to suffer severe and irreparable injury as a result of defendants' acts, policies, and practices as set forth above.

18.

Unless restrained by this court, the defendants will continue to violate the constitutional rights of the Plaintiffs to vote and to elect their nominees of choice, and the acts of defendants will continue to chill and deter the free exercise of that right to vote.

19.

Plaintiffs have no plain, adequate, or complete remedy at law to redress these violations of their constitutional rights, and this suit for injunction and declaratory judgment

is their only means of securing complete and adequate relief. No other remedy would offer Plaintiffs substantial and complete protection from continuation of defendants' unlawful and unconstitutional acts, policies, and practices.

20.

Plaintiffs have retained the undersigned attorneys and are obligated to pay their attorneys fees, as well as the associated costs of this litigation, including expert witness fees.

WHEREFORE, Plaintiffs respectfully request that the Court grant them the following relief:

A. Declare the use of the open primary in the Democratic Party Primary in the Fourth Congressional District violates the Plaintiffs' rights to Equal Protection under the Fourteenth Amendment and sufferage under the Fifteenth Amendment.

B. Declare the results of the August 2002 Democratic Primary and the November 2002 General Election for the Fourth Congressional District to be void.

C. Enjoin the use of the open primary in the Democratic Party primaries in the Fourth Congressional District of Georgia.

D. Require the State of Georgia, Ms. Latimore, and Ms. Ledford register voters in the Fourth Congressional District by political party.

E. Direct that the State of Georgia devise a method to ensure that only members of the Democratic Party in the Fourth Congressional District are permitted to vote in the

Democratic Party primary in the Fourth District.

F. Direct that the State of Georgia, Ms. Cox, Ms. Latimore, and Ms. Ledford immediately conduct a special Democratic primary that ensures that only members of the Democratic Party in the Fourth Congressional District are permitted to vote in the Democratic Party primary in the Fourth District and direct that the State of Georgia conduct thereafter a special general election for Fourth Congressional District.

G. An award of attorneys fees and costs, including expert witness expenses.

H. All other relief that is appropriate.

COUNT II

VIOLATION OF PLAINTIFFS' RIGHTS UNDER THE FIRST AMENDMENT

21.

Plaintiffs repeat and reallege the allegations of paragraphs 1 through 12 as if set forth herein.

22.

The First Amendment to the United States Constitution guarantees the Plaintiffs a right of association with other Democrats in the choice of nominees of the political party.

23.

By constructing a primary system in which all voters, regardless of personal political affiliation are permitted to vote in the Democratic Primary in the Fourth Congressional District, the State of Georgia has interfered with the right of Plaintiffs and other Democratic voters to chose the nominees of their political party.

24.

The result of the open primary system in the Fourth Congressional District is the nomination of a person as the Democratic Party candidate who was not the choice of the majority of the Democratic Party voters who voted in the August 2002 primary.

25.

Plaintiffs have suffered, are suffering, and will continue to suffer severe and irreparable injury as a result of defendants' acts, policies, and practices as set forth above.

26.

Unless restrained by this court, the defendants will continue to violate the constitutional rights of the Plaintiffs to vote and to elect their nominees of choice, and the acts of defendants will continue to chill and deter the free exercise of that right to associate.

27.

Plaintiffs have no plain, adequate, or complete remedy at law to redress these violations of their constitutional

rights, and this suit for injunction and declaratory judgment is their only means of securing complete and adequate relief. No other remedy would offer Plaintiffs substantial and complete protection from continuation of defendants' unlawful and unconstitutional acts, policies, and practices.

28.

Plaintiffs have retained the undersigned attorneys and are obligated to pay their attorneys fees, as well as the associated costs of this litigation, including expert witness fees.

WHEREFORE, Plaintiffs respectfully request that the Court grant them the following relief:

A. Declare the use of the open primary in the Democratic Party Primary in the Fourth Congressional District violates the Plaintiffs' rights to associate under the First Amendment.

B. Declare the results of the August 2002 Democratic Primary and the November 2002 General Election for the Fourth Congressional District to be void.

C. Enjoin the use of the open primary in the Democratic Party primaries in the Fourth Congressional District of Georgia.

D. Require the State of George, Ms. Latimore, and Ms. Ledford register voters in the Fourth Congressional District by political party.

E. Direct that the State of Georgia devise a method to ensure that only members of the Democratic Party in the Fourth Congressional

District are permitted to vote in the Democratic Party primary in the Fourth District.

F. Direct that the State of Georgia, Ms. Cox, Ms. Latimore, and Ms. Ledford immediately conduct a special Democratic primary that ensures that only members of the Democratic Party in the Fourth Congressional District are permitted to vote in the Democratic Party primary in the Fourth District and direct that the State of Georgia conduct thereafter a special general election for Fourth Congressional District.

G. An award of attorneys fees and costs, including expert witness expenses.

COUNT III

VIOLATION OF PLAINTIFFS' RIGHTS UNDER THE VOTING RIGHTS ACT

29.

Plaintiffs repeat and reallege the allegations of paragraphs 1 through 12 as if set forth herein.

30.

The State of Georgia's use of the open primary in the Fourth Congressional District is a voting procedure which results in the rights of the Plaintiffs, who are African-American Democratic voters and who make up the overwhelming majority of the Democratic Party voters in the Fourth Congressional District, to vote in the Democratic Party primary on account of race, in violation of the rights guaranteed by 42 U.S.C. § 1973(a).

31.

Because of the use of the open primary in the Fourth Congressional District, under the totality of circumstances, the nomination of Democratic candidates in the Fourth Congressional District is not equally open to participation by African-Americans in that African-Americans have less opportunity than other members of the electorate to participate in the political process and to nominate candidates of their choice.

32.

The effect of the open primary system in the Fourth Congressional District is the nomination of a person as the Democratic Party candidate who was not the choice of the majority of the Democratic Party voters, who are overwhelmingly African-American, who voted in the August 2002 primary.

33.

Plaintiffs have suffered, are suffering, and will continue to suffer severe and irreparable injury as a result of defendants' acts, policies, and practices as set forth above.

34.

Unless restrained by this court, the defendants will continue to violate the rights guaranteed by Section 2 of the Voting Rights Act of the Plaintiffs to vote and to elect their nominees of choice.

35.

Plaintiffs have no plain, adequate, or complete remedy at law to redress these violations of their statutory rights, and this suit for injunction and declaratory judgment is their only means of securing complete and adequate relief. No other remedy would offer Plaintiffs substantial and complete protection from continuation of defendants' unlawful acts, policies, and practices.

36.

Plaintiffs have retained the undersigned attorneys and are obligated to pay their attorneys fees, as well as the associated costs of this litigation, including expert witness fees.

WHEREFORE, Plaintiffs respectfully request that the Court grant them the following relief:

A. Declare the use of the open primary in the Democratic Party Primary in the Fourth Congressional District violates Section 2 of the Voting Rights Act.

B. Declare the results of the August 2002 Democratic Primary and the November 2002 General Election for the Fourth Congressional District to be void.

C. Enjoin the use of the open primary in the Democratic Party primaries in the Fourth Congressional District of Georgia.

D. Require the State of Georgia, Ms. Latimore, and Ms. Ledford register voters in the Fourth Congressional District by political party.

E. Direct that the State of Georgia devise a method to ensure that only members of the Democratic Party in the Fourth Congressional District are permitted to vote in the Democratic Party primary in the Fourth District.

F. Direct that the State of Georgia, Ms. Cox, Ms. Latimore, and Ms. Ledford immediately conduct a special Democratic primary that ensures that only members of the Democratic Party in the Fourth Congressional District are permitted to vote in the Democratic Party primary in the Fourth District and direct that the State of Georgia conduct thereafter a special general election for Fourth Congressional District.

G. An award of attorneys fees and costs, including expert witness expenses.

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Report on the August 2002 Open Democratic Primary in the Fourth Congressional District of Georgia

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Summary of Findings

1. Republican turnout in the August open Democratic Georgia 4 primary was 44.6%; Democratic turnout was 32.2%.
2. The district is 69/31 Democratic, but for the August open Democratic primary the electorate was 61/39 Democratic.
3. Majette won 88% of the GOP vote and 34% of the Democratic vote.
4. ***62% of Majette's vote came from Republican voters.***
5. 89% of McKinney's vote came from Democrats.
6. Whites are split 50/50 between the two parties in this district.
7. Blacks are 90/10 Democratic.
8. 98% of Republicans are white.
9. 80% of Democrats are black.
10. Non-Black turnout was 38%; Black turnout was 32%.
11. This means that, although the registered voters in this district are 52% black and 48% non-black, the *turnout* on Election Day was 52% *non-black* and 48% black.
12. Majette won 90% of the non-black vote and 25% of the black vote.
13. McKinney won 75% of the black vote and 10% of the non-black vote.
14. 80% of Majette's vote came from non-blacks.

Bottom Line: Majette was the candidate of choice for Republicans and whites; McKinney was the candidate of choice for Democrats and blacks.

Introduction

On August 20, 2002, the state of Georgia held primaries to select Democratic and Republican nominees for the fourth congressional district. Under Georgia's "open primary" law, voters do not openly register or officially attach themselves to a political party. Rather, voters are free to vote in *either, but not both* party primaries by picking either the Democratic or Republican ballot at the polling place on Election Day. A voter is perfectly free to vote in the Republican primary in 1996, and change to the Democratic primary for 2002, without changing his or her underlying party attachments, or even changing his or her mind about any political issue in the intervening six years. Therefore, it is entirely possible for someone who is a lifelong Republican voter to cast a ballot in the Democratic primary in any given election. As odd as it may sound, a person who in the past 20 years cast ballots for Ronald Reagan, George Bush, Bob Dole, George W. Bush, Guy Milner, Mack Mattingly, Paul Coverdell, Sonny Perdue, and Republican candidates all the way down the ballot, was perfectly free to choose to vote in the Democratic primary on August 20, choosing between Democrat Cynthia McKinney and Democrat Denise Majette. More importantly, it is possible for many thousands of Republican voters to do this, whether coordinated or not, and effectively exercise a decisive role in picking the Democratic nominee, *assuming that a consequential number of Republican voters block vote for one candidate over the other.*

This is exactly what happened on August 20, 2002, when a large and politically consequential number of Republican voters "crossed over" to vote in the Democratic primary at a rate of over 9:1 for Denise Majette. At the same time, Democratic voters voted over 2:1 in favor of Cynthia McKinney as the Democratic nominee. This report will present evidence of this Republican crossover voting.

Inferring partisanship when we have no party registration data

Because of secret ballots, we do not know who voted for whom in this or any other election of its type. Without this data or, as a best alternative, reliable and valid survey data, we are left with having to infer individual behavior from the aggregate information that we *do* have. In general, this is called *ecological inference.* The concept underlies expert testimony used extensively in voting rights cases to demonstrate vote dilution, and has been recognized as a legitimate approach since at least *Thornburg v. Gingles* in 1986. For example, we know the percentage of blacks in each precinct, and we also know the voter turnout figure for each precinct. We then use some sort of procedure to *infer* the percent of individual blacks and non-blacks turning out to vote in each election. We do this without having any actual direct knowledge of whether any individual black or non-black actually voted. It is important to realize that there are several statistical procedures one can use to infer this individual behavior from aggregate data.

One way of doing this is with the various forms of *ecological regression analysis,* in which one known aggregate

quantity is regressed on another known aggregate quantity to infer some individual level behavioral quantity. For example, we can take as a dataset the votes for Candidate X from 200 precincts, and the percent of voters who are black in each precinct. We then regress the vote for Candidate X on the percent of voters who are black. From this, we can infer the percent of black voters voting for Candidate X. There are several ways to execute an ecological regression analysis.

Another way to infer individual political behavior from aggregate data is known as *homogeneous precinct analysis.* With this technique, the researcher selects a group of precincts that share one overwhelming characteristic. One then infers that voters who share that characteristic also share other characteristics with like voters. For example, we can select all the precincts that are over 70% black in voter registration, and all the precincts that are over 70% in Hispanic voter registration. We then examine the political outcomes in the 70% black districts, and assume that the behavior observed there (in the aggregate) is a good measure of black political behavior in general. If 90% of the people in an overwhelmingly black precinct vote for Candidate X, we infer that 90% of blacks district-wide voted for Candidate X. Likewise, if 68% of voters in an overwhelmingly Hispanic precinct are Republicans, we infer that 68% of Hispanics district-wide are Republican voters.

Without party registration information on the voters in the district, we are left with having to infer the number of Democrats and Republicans in each precinct. Obviously, the best place to find this information is in actual voting *performance.* After all, if a precinct voted 80% for George W. Bush and 20% for Al Gore, it is logical to assume a

strong correlation between the vote choice and underlying partisanship of the voters there, and conclude that about 80% of the voters there can safely be labeled Republicans. Of course, we do not know how each individual in the precinct voted, but we do know the aggregate outcome of those votes is found in the reported results of the election for each precinct. So, if we use accepted ecological inference techniques to infer individual party preference from precinct level data, *we are doing nothing different than the technique used with race characteristics outlined above.*

In the recent Supreme Court case *Hunt v. Cromartie* (2001), the Court was presented with a question like this. This case comes from North Carolina which, unlike Georgia, does keep individual-level party registration records. And, like Georgia, North Carolina records the results of elections for each precinct. So, in North Carolina, we know the number of self-identified Democrats in a precinct, as well as the number of votes cast for Democratic candidates in those precincts. Even with party registration information, the Supreme Court (in both its majority opinion and its dissent) recognized that *partisan performance data* was more telling than registration data to infer the number of Democrats and Republicans in each precinct. According to Justice Breyer in the principal opinion:

> "The District Court primarily based its "race, not politics," conclusion upon its finding that "the legislators excluded many heavily-Democratic precincts from District 12 . . . This finding, however – insofar as it differs from the remaining four – rests solely upon evidence that the legislature excluded heavily white precincts with high Democratic Party *registration,* while including heavily African-American precincts with equivalent, or lower, Democratic Party registration . . .

> As we said before, the problem with this evidence is that it focuses upon party registration, not upon voting behavior. And we previously found the same evidence, compare *ibid.* (District Court's opinion after trial) with *id.*, at 249a-250a (District Court's summary judgment opinion), inadequate because registration figures do not accurately predict preference at the polls."

In the dissenting opinion, Justice Thomas remarked:

> "And contrary to the Court's assertion, Dr. Weber did not merely examine the registration data in reaching his conclusions. Dr. Weber explained that he refocused his analysis on *performance*. He did so in response to our concerns, when we reversed the District Court's summary judgment finding, that voter registration might not be the best measure of the Democratic nature of a precinct."

Both the majority and minority opinions in this case agreed that voter *performance* (i.e. vote results by precinct) are often a better indicator of underlying partisan forces than official *partisan registration* statistics. Here, in the case of North Carolina, the Court puts a higher premium on partisan vote *outcomes* than it does on the existing partisan *registration*. In a situation like we have in Georgia, which does not require voters to declare an affiliation with any party, we *only* have vote outcome information. Therefore, to use vote outcome information instead of (the non-existent) voter registration information is no disability in this analysis. Indeed, were Georgia to keep registration statistics by party, the Court would *still* likely prefer the *performance* data, which we *do* have here.

Throughout this report, I will be reporting the results of a homogenous precinct analysis conducted on precincts which are within the boundaries of Georgia 4. The percentage of "Republican" voters in a precinct is taken to be the precinct-wide average vote cast for Republican candidates George W. Bush (Presidential electors), Mack Mattingly (U.S. Senate), and Sunny Warren (Georgia 4) in the November 7, 2000 general election. Likewise, the percentage of "Democratic" voters in taken to be the votes cast for their Democratic opponents (Gore, Miller, and McKinney). The percentage of black and non-black voters in each precinct is a known quantity from the voter registration lists, as is turnout, and the percent of people in each precinct who voted for Cynthia McKinney and Denise Majette in the August 20, 2002 primary. The aggregate level results from precincts that are at least 70% black, non-black, Democratic-performing, and Republican-performing, respectively, are used as inferred indicators of black, non-black, Democratic, and Republican individual behavior.

Descriptive Results

Map 1 indicates the average percentage of Democratic ballots cast in three November 2000 general elections for presidential electors, Senator, and Georgia 4 Representative. This and the maps to follow share a common color coding, with blue indicating low levels of a quantity, and deeper and deeper red indicating high levels of a quantity. Here, the redder the precinct, the more Democratic votes cast there in 2000.

Likewise, the bluer a precinct, the more Republican votes cast there in 2000. Pale blue and red precincts indicate a

closer election, and the white precincts indicate rough balance between the Democrats and the Republicans. It is obvious that the precincts within Georgia 4 are, in the aggregate, solid Democratic territory.

[Map 1 Average Democratic Vote in November 2000 General Election Omitted in Printing]

Further, there is a clear regional pattern, with the southern Dekalb precincts performing overwhelmingly for the Democrats, and northern Dekalb performing for the Republicans, though not as overwhelmingly. Indeed, an average 68.77% of the two party votes cast in these three races in November 2000 were for the Democrats, and only 31.23% were for the GOP. By any measure, Georgia 4 is solidly in the Democratic camp, with the southern precincts being virtual locks for the Democrats.

Maps 2 shows us one of the individual components of this average measure: the vote for Democrat Cynthia McKinney in the November 2000 general election against Republican Sunny Warren. These results are very similar to the average results in Map 1, with the Democrat McKinney taking an overwhelming majority of the vote in southern Dekalb, while losing in most of the Republican-performing northern precincts, with the exception of the heavily Hispanic precincts around Doraville and Chamblee. The maps for the Al Gore and Zell Miller votes, while not shown here, are very similar. There is an obvious regional pattern to the partisan vote choices in Georgia 4.

[Map 2 Vote for Cynthia McKinney in the November 2000 General Election Omitted in Printing]

Map 3 shows the results of the August 20, 2002 Democratic primary between Cynthia McKinney and Denise Majette. With the exception of Pine Lake and the

area to the east of Stone Mountain, Cynthia McKinney won southern Dekalb, and Denise Majette won northern Dekalb. The latter also won the areas in the Emory University area in western-central Dekalb County. Of course, Majette also won the overall election that day. What is important about these maps is that the overall pattern of voting does not change much from map to map. Heavily Republican performing precincts performed for Republican Sunny Warren in 2000 and for *Democrat* Denise Majette in 2002. Likewise, heavily Democratic precincts on average performed for Democrat Cynthia McKinney in 2000 and again in the 2002 Democratic primary. At least visually, then, there seems to be a great deal of geographic overlap between the presence of *Republican* voters and the presence of votes for *Democrat* Denise Majette. Maps 4 and 5 make this relationship strikingly clear.

[Map 3 Vote for Cynthia McKinney in August 2002 Democratic Primary Omitted in Printing]

Maps 4 and 5 present comparisons of the McKinney 2002 vote and the Gore 2000 vote, and the Majette 2002 *Democratic* primary vote and the vote for *Republican* candidate Bush in 2000. The results are visually striking. In general, Bush country in the 2000 general election became Majette country in the 2002 open Democratic primary. Likewise, Gore country in 2000 overlapped McKinney country in 2002.

Maps are extremely interesting and indicative from one point of view. But they are not the only way – or even the best way – to summarize geographically-structured political information. Since everything we are dealing with here is expressed in percentage terms – Republicans, Democrats, blacks, whites, McKinney, and Majette, the

relationships between any two of these quantities can be easily summarized on a two-dimensional scatterplot, over which a statistical fit can be placed to give us a more rigorous, formal way to express what our eyes seem to be telling us in the maps.

[Map 4 The relationship between the vote for Democrat Al Gore and Democrat Cynthia McKinney Omitted in Printing]

[Map 5 The relationship between the vote for Republican George W. Bush and Democrat Denise Majette Omitted in Printing]

Figures 1, 2, and 3 are scatterplots which show the precinct vote for Denise Majette in August 2002 on the vertical (y) axis and the (1) average GOP November 2000 vote, (2) average Bush November 2000 vote, and (3) average vote for GOP Georgia 4 candidate Sunny Warren in November 2000 on the horizontal (x) axis. In this way, we can more formally summarize the data we saw in the previous maps about the apparent correlation between Republican performance and Majette performance in the Georgia 4 precincts. Each scatterplot also contains a linear regression line which was fit to these points, along with the regression equation that describes that line algebraically.

All the figures tell us basically the same thing: there is a strong correlation between how well Majette does in the 2002 open primary in a precinct and how many Republican votes were cast in that precinct in 2000.

[Figure 1 Majette Vote in 2002 by Average GOP Vote in 2000 Omitted in Printing]

Figure 1 shows that, as the average GOP vote in a precinct increases, the average vote for Majette in the open Democratic primary increases. The more Republican a precinct, the more Majette a precinct.

Figures 2 and 3 show the same information for the Bush presidential vote and the Sunny Warren vote in that Republican's general election race against Cynthia McKinney in November 2000.

[Figure 2 Majette Vote in 2002 Vote by George W. Bush 2000 Vote and Figure 3 Majette 2002 Vote by Warren Vote in 2000 General Election Omitted in Printing]

Both these figures are simply another version of Figure 1. Likewise – and probably even more important for the current case – Figure 3 indicates a strong correlation between the vote for Republican Sunny Warren in 2000 against Democrat Cynthia McKinney and vote for Democrat Denise Majette in 2002 (against the *same* Cynthia McKinney, but this time in an open primary rather than general election). The fact that the performance of two opponents of McKinney is so similar is important, since in one context there are partisan cues (Democrat McKinney versus Republican Warren), and in the other there are not partisan cues (Democrat McKinney versus Democrat Majette). Both races were African-American females running against each other, and the vote of the two McKinney opponents is strikingly similar, *even though one is a Democrat running in an open Democratic primary, and one is a Republican running in a general election.* One is left with the impression from this data, and from the preceding maps, that perhaps the same types of people were voting for Republican candidates in these three races

as voted for *Democrat* Denise Majette in the open *Democratic* primary in August 2002. The remainder of this report is devoted to estimated more precisely how many of these people there were.

Analytical Results: GOP Crossover voting defeated Cynthia McKinney in the Democratic Primary

Tables 1 and 2 present the results of a homogenous precinct analysis of what happened on August 20, 2002. Table 1 shows that Denise Majette's victory is the result of GOP crossover voting, and that she was *not the Democratic voter candidate of choice.* First, we know that of all the eligible voters in these precincts, 117,670 voted on August 20, for a turnout rate of 33.55%. Denise Majette received 19,554 more votes than Cynthia McKinney in these precincts. In the aggregate, then, the election was not close. But since we know from Figures 1-3 and the preceding maps that Majette did best in areas where Republican candidates performed well, we need to estimate the *partisan* breakdown in both turnout and vote choice. Using the standard ecological inference technique homogeneous precinct analysis, I estimate that Republican turnout was 44.60% in this election, which is over 12% higher than the Democratic turnout of 32.19%. In fact, even though an average of 68.77% of these precincts' votes were cast for the three Democratic candidates in November *2000,* only 61.38% of those voting in August *2002* were Democrats.

Of those 38.62% of voters who were Republicans (based on vote performance) who cast ballots in the August 2002 primary, over 87% of their votes went to Denise Majette. Therefore, in the August 2002 *Democratic* primary,

Denise Majette received nearly *all* the Republican vote, and Republican turnout was much higher than Democratic turnout. Further, Majette only won an estimated 34.18% of the Democratic vote in the Democratic primary, while Cynthia McKinney won about two-thirds of the primary vote cast by Democratic-performing voters. When one uses these figures to come up with actual numbers of voters casting ballots for each candidate, one finds that Majette took the Republican vote by 36,824 votes, and lost the Democratic vote by 24,554 votes. *Since her winning margin was 19,554, had the primary been restricted only to Democrats, Denise Majette would not have won, all else being equal.* In fact, an estimated 61.75% of Majette's vote came from Republican voters, while 89.48% of McKinney's vote came from Democratic voters. Denise Majette was the clear candidate of choice of Republican voters, but Cynthia McKinney was the clear candidate of choice for Democratic voters.

Table 1 The Effects of Georgia's Open Primary Law on the Outcome of the 2002 Democratic Primary in Congessional District 4

Partisan Consequences

Total Votes Cast	117,670
Votes for Majette	68,612
Votes for McKinney	49,058
Republican Voters in district	31.23%
Democratic voters in district	68.77%
Republic Turnout in 2002 primary	44.60%
Democratic Turnout in 2002 primary	32.19%
Estimated % of Voters in 2002 Primary Republican	38.62%

Estimated % of Voters in 2002 Primary Democratic	61.38%
Republican Vote for Majette	87.69%
Republican Vote for McKinney	12.30%
Democratic Vote for Majette	34.18%
Democratic Vote for McKinney	65.81%

What Happened?

Estimated Number of GOP votes received by Majette	42,832
Estimated Number of GOP votes received by McKinney	6,008
Net advantage in GOP vote for Majette	***36,824***
Estimated Number of Democratic votes received by Majette	26,534
Estimated Number of Democratic votes received by McKinney	51,088
Net advantage in Democratic vote for McKinney	***24,554***
Estimated Percent of Majette's Total Vote Republican	61.75%
Estimated Percent of McKinney's Total Vote Democratic	89.48%
Estimated Percent of Democrats Voting for McKinney	65.81%
Can the Majette win be attributed solely to GOP crossover voting?	**YES**
Was Majette the Democratic candidate of choice?	**NO**

Table 2 presents exactly the same type of information, this time highlighting the racial rather than partisan consequences of Georgia's open primary. According to homogenous precinct analysis, 89.11% of blacks in these precincts are Democrats, while non-blacks are split nearly 50-50 between the two parties. Owing to Georgia 4's voter

registration breakdown, this means that 98.08% of the Republican voters there are non-black, while 78.76% of the Democrats are black. In other words, Democrats are overwhelmingly black and Republicans are overwhelmingly not black. This has implications for identifying the black candidate of choice in this election. Why, one might ask, is this even an issue? After all, voters are simply choosing between two black candidates. Justice Brennan in *Thornburg v. Gingles* was very clear that the determination of who was the candidate of choice for any ethnic group need not be dependent on the race of the candidates. In that case, Justice Brennan was most likely assuming that a white candidate could be the black candidate of choice when running against another white candidate. Logically, the same way of thinking could hold here.

Table 2 indicates that estimated black turnout in this August 2002 race was 32.03%, somewhat lower than the 38.00% estimated non-black turnout. This turnout differential is consequential. Even though the majority – 52.10% – of voters in these precincts are black, with this kind of turnout differential *blacks constituted a minority of voters in the August 2002 primary.* So, if it turns out that the black candidate of choice was defeated by the block voting of the white voting majority against that candidate, then at least one prong of *Gingles* may have been satisfied here. The black candidate of choice turns out to be Cynthia McKinney, who received an estimated 75.08% of the black vote, thus beating Denise Majette 4:1 among black voters. Conversely, Denise Majette was the clear candidate of choice of the non-black voting majority, capturing an estimated 90.44% of the votes of people who were not black.

The bottom half of Table 2 takes these percentages and estimates the raw numbers of different types of people voting for the two candidates. Here, we see that Cynthia McKinney captured over 28,000 more black votes than Denise Majette, but that Majette won over 51,000 more non-black votes than did McKinney. This means that about 80% of the people voting for Majette were not black, and that over 87% of the votes captured by McKinney were from African-Americans. In the end, there can be little doubt from these results that Denise Majette was the candidate of choice of the non-black majority, and that Cynthia McKinney was the candidate of choice for African-American voters in this open primary.

Table 2 The Effects of Georgia's Open Primary Law on the Outcome of the 2002 Democratic Primary in Congressional District 4

Racial Consequences

Total Votes Cast	117,670
Votes for Majette	68,612
Votes for McKinney	49,058
Black voters in district	52.10%
Non-black voters in district	47.90%
Black Turnout in 2002 primary	32.03%
Non-Black Turnout in 2002 primary	38.00%
Estimated % of Voters in 2002 Primary Black	47.83%
Estimated % of Voters in 2002 Primary Non-Black	52.17%
Black Vote for Majette	24.92%
Black Vote for McKinney	75.08%

Non-Black Vote for Majette	90.44%
Non-Black Vote for McKinney	9.56%

What Happened?

Estimated Number of Black votes received by Majette	14,025
Estimated Number of Black votes received by McKinney	42,256
Net advantage in Black vote for Majette	***28,231***
Estimated Number of Non-black votes received by Majette	57,728
Estimated Number of Non-black votes received by McKinney	6,102
Net advantage in Non-black vote for Majette	***51,626***
Estimated Percent of Majette's Total Vote Non-Black	80.45%
Estimated Percent of McKinney's Total Vote Black	87.38%
Estimated Percent of Blacks Voting for McKinney	75.08%
Can the Majette win be attributed to block voting by non-blacks to stop the election of a black candidate of choice?	**YES**
Was Majette the Black candidate of choice?	**NO**

Conclusion

All else being equal, had this primary election been restricted only to Democrats – Cynthia McKinney very likely would have won. Further, she was actually the clear candidate of choice of Democrats. Further still, McKinney was the clear candidate of choice of the protected class of voters in the district.